4-434

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 239.

WILLIAM D. STEWART, ADMINISTRATOR OF JAMES STEWART, DECEASED, ALLEN S. CUTTS, ET AL., APPELLANTS,

vs.

EZEKIEL SALAMON, SIDNEY ROOT, JOHN N. BEACH, AND EDWARD W. MARSHALL, AS SALAMON, ROOT & CO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

FILED NOVEMBER 17, 1874.

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a At a circuit court of the United States for the southern district of Georgia, begun to be holden at Savannah, in said district, on Thursday after the first Monday (being the sixth day) of November, in the year eighteen hundred and seventy three.

Present: the honorable William B. Woods, United States judge for the fifth judicial circuit, and the honorable John Erskine, United States judge for the districts of Georgia, presiding. Among other things the following proceedings were had, to wit:

SALAMON, ROOT AND COMPANY, COMPLAINANTS,
and
ALLEN S. CUTTS AND OTHERS, DEFENDANTS. } In equity.

Be it remembered that heretofore, to wit, on the fourteenth day of November, A. D. 1871, came the said complainants, by their solicitors, Messrs. Nisbets and Jackson, and filed their bill of complaint against the defendants, as follows, to wit:

Bill of complaint.

1 In the fifth circuit court of the United States for the southern district of Georgia.

To the judges of the fifth circuit court of the United States for the southern district of Georgia:

Ezekiel Salamon, Sidney Root, John N. Beach, and Edward W. Marshall, merchants doing business *doing business* in partnership under and by the name and style of Salamon, Root & Co., of the city of New York, and citizens of the State of New York, bring this their bill against Allen S. Cutts, Thomas J. Stewart, Joseph T. Turner and his wife, Martha Turner, of the county of Sumter, in Georgia, and citizens of the State of Georgia, in the southern district of Georgia; and against William D. Stewart, in his own right and administrator on the estate of James Stewart, deceased, and guardian of Fanny Eddy and Katy Stewart, minor children of James Stewart, jr., of the county of Schley, in Georgia, and a citizen of the State of Georgia; and William C. Dodd and his wife, Eliza Dodd, of the county of Terrell, in Georgia, and citizens of the State of Georgia; and Edward J. Plowden and his wife, Matilda Plowden, of the county of Calhoun, in Georgia, and citizens of the State of Georgia; and Robert M. McMullen, of Texas, and a
2 citizen of the State of Texas, but represented by said William D. Stewart, as his agent in Georgia; and against Buchanan & Bro., Andrew J. Buchanan, and Frank H. Buchanan, of Americus, Georgia, and citizens of the State of Georgia; William W. Barlow and Merrill Callaway, (Barlow and Callaway,) Blumer & Caldwell, full names unknown; William K. Steward and George Stapleton, (Stewart and Stapleton,) David Barwald, Henry C. Bailey, Robert T. Byrd, preus'ent, and Frank E. Burke, cashier, of the Security Loan & Saving Association; Samuel Cohen, John W. Jordan, jr., presiding officer of Good Templars' Hall; W. Travis Weaver, Samuel Anthony, Louis Samuel Anthony, Mark Anthony, Patrick B. Simons, Mrs. Andrew J. Buchanan, William T. Toole, presiding officer of Masonic Hall; Robert C. Black, Alfred B. Sewell, Jack Brown, James Roche, J. Riley Covington, William Croghon, Victoria Plott, John Brake, Alexander W. Wheeler, John Ansley, Randal Duckworth, Nancy Beard, J. Isaac Hudson, Andrew J. Hamil, and George Andrews, all of Americus, in Georgia, and citizens of

the State of Georgia, and tenants renting certain mortgaged property hereinafter described and in possession thereof; and against J E. Burke, assignee in bankruptcy of one Benjamin Mordecai, of Charleston, in South Carolina, and a citizen of the State of South Carolina.

And thereupon your orators complain and say that the said Allen S. Cutts and said James Stewart, deceased, were on the tenth day
3 of August, in the year of our Lord eighteen hundred and sixty-seven, indebted to the said Benjamin Mordecai in a very large sum of money, and being so indebted had given the evidence thereof in a certain single bill or promissory note under seal, dated the eighth day of January, eighteen hundred and sixty-three, whereby the said James Stewart promised to pay to the said Allen S. Cutts or order forty-four thousand dollars, for value received, and the said Allen S. then and there endorsed and delivered the same to the said Benjamin Mordecai. Your orators state to your honors and expressly allege and charge that the said Allen S. and the said James, before the date of said note, and before the war, and upon a gold consideration and basis, had been and were indebted to the said Benjamin upon various evidences of indebtedness which he held against them, and the note aforesaid was at the date aforesaid made for said Benjamin and delivered to him on full settlement on a gold basis of such indebtedness so owing by them to him; and that the better to secure the payment of said note, the said James Stewart at the date of said note executed and delivered to the said Benjamin Mordecai a mortgage-deed covering certain real estate in the city of Americus, in said county of Sumter, consisting of a certain hotel in said city, at the date of said mortgage in possession of one Ben-
4 jamin King, a large brick two-story store on the east side of Johnson street, and another two-story brick store on the same side of said street and south of the former store; also one-half interest in a certain building on Lamar street, known as the Masonic Hall; also a two-story brick store on the south side of Lamar street; all which will more fully appear from a copy of said note and mortgage hereto annexed and marked "Exhibit A," and which your orators pray may be taken as part of this bill, with leave of reference thereto as often as may be necessary.

Your orators further show unto your honors that on the seventeenth day of March, eighteen hundred and sixty-six, the said Benjamin Mordecai, in the superior court of the State of Georgia, for the county of Sumter, commenced suit on said note against said Cutts and Stewart on said note or single bill, and proceedings against said Stewart to foreclose the mortgage under the statutes of Georgia; and that pending the same the said James Stewart, then in life, filed in said superior court a bill in equity against the said Benjamin Mordecai, and made the said Allen S. Cutts a pro-forma party thereto; pending all which the said Benjamin Mordecai removed the entire proceedings in all said cases to the circuit court of the United States for the southern district of Georgia, in the fifth circuit, on the ground that he could not get
5 justice in said superior court of said county of Sumter, in accordance with the act of Congress in such cases made and provided, in which said circuit court of the United States the said cases are now pending; all which will more fully appear from the copies of said records hereto annexed and marked "Exhibit B," and made part of this bill, with leave to refer thereto when necessary.

Your orators further show unto your honors that on the first day of July, eighteen hundred and sixty, the said Benjamin Mordecai made his application to be declared a bankrupt in the district court of the

United States, in the city of Charleston and State of South Carolina, where he resided, and was adjudged a bankrupt on the day of , eighteen hundred & seventy- , and the said J. E. Burke was appointed his assignee in bankruptcy; all which will more fully appear from the proceedings of said court hereto annexed and marked "Exhibit C," and made part of this bill, and to which leave of reference is prayed when deemed necessary.

Your orators further show unto your honors that long prior to the adjudication in bankruptcy, and to the petition therefor by the said Benjamin Mordecai, the said Benjamin, not then contemplating bankruptcy, nor having committed any act of bankruptcy, to wit, on
6 the tenth day of August, in the year of our Lord eighteen hundred and sixty-seven, transferred and assigned to your orators all of his claim on the said Allen S. Cutts and James Stewart for the purpose of securing your orators in the payment of certain sums of money which the said Benjamin owed your orators before that time, and which had been attempted to be secured by a certain other mortgage and note, which your orators aver and show to your honors proved wholly unproductive.

Your orators show that the said Benjamin was at that time justly and bona-fide indebted to them in the sum of thirty-three thousand four hundred and fifty-four dollars and forty-five cents; that said indebtedness was in two promissory notes—one for twenty-three thousand four hundred and fifty-four dollars and forty-five cents, secured by mortgage on property in the city of Charleston, South Carolina, and the other for ten thousand dollars on Joseph Purcell and Gabriel Davis, and endorsed by said Benjamin Mordecai; that the transfer of said claim by said Mordecai to your orators was to secure said notes, if said mortgage did not secure the one and if said Purcell and Davis did not pay the other, and your orators again say that said mortgaged property in Charleston did not pay any part of the one, it having been sold and the proceeds ap-
7 plied to older mortgages—to other creditors of said Mordecai; and they again say that said Purcell and Davis have not—they or either of them—paid any part of the other note; all which will more clearly appear from a copy of said transfer and assignment hereto annexed and marked "Exhibit D," and made part of this bill, with leave to refer thereto when necessary.

Your orators further show unto your honors that since the removal of said cases to the said circuit court of the United States the said James Stewart hath departed this life intestate, and that the said William D. Stewart sued out letters of administration upon his estate.

Your orators further shew that the heirs at law of the said James Stewart, deceased, are the said William D. Stewart, Thomas J. Stewart, Martha Turner, wife of Joseph T. Turner, Fanny Stewart, Eddy Stewart, and Katy Stewart, children of James Stewart, jr., deceased, representing their father, and represented here by the said William D. Stewart, Eliza Dodd, wife of William C. Dodd, Matilda Plowden, wife of Edward J. Plowden, and Robert M. McMullen, only son of Mrs. Jane McMullen, formerly Jane Stewart, deceased, and through his said mother entitled to one share of said estate.

Your orators further shew unto your honors that the said William D. Stewart, administrator as aforesaid, in total disregard of his duties as such administrator, and in violation thereof, after an effort to pro-
8 cure an order of division of said estate from the ordinary of said county of Sumter, and the refusal of the ordinary to grant said order for such division, hath divided and partitioned the entire estate o

the said James Stewart, including the said mortgaged premises, among the said heirs at law of said James Stewart, and the said heirs at law are now in the use and enjoyment thereof, and the said tenants renting the same are paying rent to said heirs-at-law.

Your orators further shew unto your honors that they have been unable, after most diligent search by their counsel, to ascertain the parts of said estate which have fallen in the said division to each heir, and therefore cannot shew your honors what heir at law is in possession of each portion of property so mortgaged, but have understood that the said Thomas J. Stewart and the said Joseph T. Turner and his wife, Martha, and the said William C. Dodd and his wife, Eliza, are in the receipt of the rents of said property mortgaged, and that the same has fallen to their share, but how and in what proportions or whether they alone have received the same from the said administrator or whether others of said heirs are also interested in portions, these defendants do not know, and have no means of ascertaining the truth in regard thereto, except by resort to the consciences of said administrator and said heirs at law.

9 Your orators further shew that no return of said clandestine and illegal division of said estate has been made to the ordinary of said county of Sumter, and no record of said partition or division of said estate is to be found anywhere on any court or record-book, so far as your orators, after most diligent search, have been enabled to find as aforesaid, which fact your orators charge as an evidence of the fraudulent intent of said administrator and the said heirs at law.

Your orators further shew unto your honors that the said property, if all preserved and kept in thorough repair, would not be adequate to the payment of the very large debt due upon said mortgage, but they say further that it is in danger of destruction by fire at any time; that the hotel especially, being a large wooden building, and considerably worn and extending into and connected with a long range of wooden stores and shops, is in imminent danger of destruction by fire; that this hotel is the most valuable of all of said property so covered by the mortgage aforesaid; that the said parties in possession are receiving the rents, issues, and profits of all this mortgaged property, and whether kept insured or not your orators cannot affirm, but if insured it is for their own benefit, and the money would be paid to them and not to your

10 orators; that knowing this debt transferred to your orators to be just and that it must eventually take said property, these parties in possession are actually interested, if they have insured it, to have it burned before or immediately after your orators obtain a foreclosure thereon.

Your orators thus shew unto your honors that they have an equitable claim to and lien upon said property so mortgaged, that it is their only hope to secure the debt due them from the said Benjamin Mordecai, as he has been adjudged a bankrupt as aforesaid; that the assignee in bankruptcy aforesaid cannot be made a party in the stead of the said Benjamin Mordecai in the common-law suit and proceeding to foreclose said mortgage as plaintiff, because of the transfer of said claims to your orators long prior to his appointment, and to the commission of any act of bankruptcy by the said Benjamin Mordecai; nor can your orators be made parties plaintiffs thereto because they have no such legal interest in said claim as would authorize said suits to proceed in their name.

Your orators further shew that William D. Stewart, the said administrator, has wholly wasted, mismanaged, and alienated the said estate as against their just debt as aforesaid; that he has conspired with the

heirs at law of said estate, of whom he is one, and with whose
11 interests his own are interwoven, to defraud your orators out of said mortgaged property and the proceeds thereof; that he has parted with the power, if he ever had the inclination, to pay the debt transferred to your orators as aforesaid; that he has reserved no funds, no portion of said estate, to pay this debt; that he has parted with the title which he held in said property to pay this debt, and has thereby shown his utter incapacity to manage said estate according to law and to preserve this fund for the use to which it was pledged; that the said fund is in great danger of being destroyed; that its rents, issues, and profits are going into other and irresponsible hands; that the securities on his administration-bond are of little or no tangible property; that the parties holding under said division the mortgaged premises aforesaid are worth nothing except the share of the said estate which fell to each; that they may sell the said mortgaged property at any time and thus multiply the suits your orators would be forced to bring, and jeopard more and more their just debts, and increase litigation, and multiply suits; and that your orators fear and apprehend the loss of their entire debt, unless speedy relief be granted them by your honors.

Your orators further shew unto your honor that nothing has been paid upon said mortgage by said Allen S. Cutts or said James Stewart in his life-time, or by said administrator or his estate since his
12 decease, upon the said mortgage-debt, but that the same remains open and unpaid; and that your orators succeeding equitably to all the rights of the said Benjamin Mordecai in and to said mortgage, are entitled to have the same foreclosed, and the said property sold under such decree as your honors shall see fit to mould for the satisfaction of the debt of your orators.

In view of all the premises, your orators had well hoped that, the said Allen S. Cutts failing to pay any part of said debt, as he is insolvent and hopelessly unable to pay the same, the said administrator and heirs at law would have arranged in some way to settle the just claims of your orators in the premises; and to that end your orators, through their counsel and in a friendly manner, have frequently made application to them for a settlement, and requested them to take some step to satisfy their demands. But now so it is, may it please your honors, the said William D. Stewart, administrator as aforesaid, and the said heirs at law, combining and confederating together, and contriving how to injure your orators in the premises, utterly refuse to pay the said debt of your orators or any part of it, or to come to any arrangement at all satisfactory to your orators, or just and equitable.

And your orators charge that the said mortgaged premises are a very scanty security for the payment of what is due your orators in
13 the premises, and that said heirs at law claiming the equity of redemption therein ought either to pay said debt of your orators or to release their equity of redemption in said premises; but they also utterly refuse to do either.

All which actings, doings, and pretences of the said defendants are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orators in the premises.

In consideration whereof, and forasmuch as your orators are wholly remediless in the premises, according to the strict rule of the common law, and can have adequate relief only in a court of equity, where matters of this nature are properly cognizable and relievable:

To the end, therefore, that the said defendants may, if they can, show why your orators should not have the relief hereby prayed, and may

upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder-written they are respectively required to answer, that is to say:

1. Whether the said James Stewart and Allen S. Cutts were
14 not indebted, as charged, to said Benjamin Mordecai, and did not give their notes, as charged?

2. Whether, to secure said note, the said James Stewart did not give the mortgage as charged, and whether the copy attached is not a correct copy of the same?

3. Whether suits on the note and mortgage were not brought by Mordecai, as charged, and bill filed by Stewart, as charged, and the entire litigation removed to the circuit court, as charged, and whether the copies of the proceedings annexed hereto and exhibited are not correct?

4. Whether the said Benjamin Mordecai did not apply to be declared a bankrupt, as charged, and was not discharged, and whether has not been appointed his assignee in bankruptcy?

5. Whether the said Benjamin Mordecai did not assign and transfer his interest in the claim against Cutts and Stewart to orators, as charged, and whether they did not hear of it, and when they and each of them heard that it was so assigned, or that orators, or either of them, had an interest therein?

6. Whether the said James Stewart is not dead, and when he did die, and who administered upon his estate, and when he took out letters?

7. Who are the securities upon his administration-bond, what each security is worth in property, and what each is worth in prop-
15 erty outside of what he received from the estate of James Stewart?

8. Whether any inventory, appraisement, and returns of said estate have been made, and attach copies of them all to your answers, and of the administration-bond?

9. Who are the heirs at law of the said James Stewart, and set out in full all their names, and how each is entitled to his share of the estate, and what the share of each is?

10. Did James Stewart die intestate, as charged?

11. What is the value of the estate and of each share?

12. Has not the property been divided? When and where did the division take place, and by order of what court, if any court?

13. Was not application made to the ordinary of Sumter County to divide the estate, and did he not reject the application on the ground of the indebtedness of the estate, and particularly of the indebtedness to your orators and the mortgage to Mordecai?

14. When was this application made and rejected? and when you attach copies of your returns to your answer, attach also copies of this application and the order rejecting it.

15. Has any return of the division of the property been made? When? and attach a copy, if any has been made to any court.

16. Is there any record of the division of said property?
16 Where? In what court? and attach a certified copy.

17. Were deeds made? By whom, to whom? and attach copies of all of them.

18. To whom did each piece of the mortgaged property described in the copy mortgage hereto exhibited, fall in said division? Set out the paper-evidence thereof in full to your answer.

19. Was the said division in writing? Set out a full copy of it, if in one writing, and of all of them if in more than one.

20. Why has not this division and partition been returned to the ordinary court and recorded there?

21. Is any fund reserved to pay this debt? What fund? If you say refunding bonds are taken, who are the securities to said bonds? and attach copies to your answers.

22. What tenants are in possession of each piece of property covered by the Mordecai mortgage, and to whom does each tenant pay rent, and how much has been paid to each landlord up to this time, and when was each sum paid, and in what proportions, monthly or quarterly; and what does each piece of property rent for now; and is it rented to be paid monthly or quarterly?

23. Is the mortgaged property insured; each separate piece? For what amount, in what company, and for whose benefit, and who had it insured?

17 24. What is the condition of each piece of mortgaged property as to liability to fire? What can each piece be insured at, of what material built, and what structures join each piece, and of what are they built? Describe the property and its surroundings.

25. What is each heir at law of James Stewart worth; what outside of the property he got by the said estate; what outside of that, and homestead exemptions?

26. What property of James Stewart came into the hands of the administrator, and what disposition he has made of each item of property so coming into his hands.

27. What property of James Stewart has come into the control and use and possession, or the control, use, or possession of each heir at law; how it so came into such control, use, or possession; and what disposition, by sale, or gift, or mortgage, or homestead, or settlement, or lien of any sort, has been made of each piece of property?

28. Set out in each of your answers the deed, or other writing of any sort by which you hold any of the property of the estate of James Stewart, deceased, and any settlement or incumbrance of any kind which was upon it when you got it, or which you have or any one else has put upon it since you got it?

And that the said tenants renting the property so mortgaged may be enjoined and restrained from the payment of rent to the said de-

18 fendants, or either of them, until the further order of your honors, and that the said defendants be restrained from collecting the same, and that a receiver be appointed to take charge of said mortgaged property, and preserve the same, and rent out and receive the rents, issues, and profits of the same, and hold them subject to the orders of your honors, to await the result of this litigation; and that the said defendants, Allen S. Cutts, and the said administrator, William D. Stewart, and the said assignee in bankruptcy, J. E. Burke, be restrained from the further pressing of said suits so pending in said circuit court of the United States between them and the said Benjamin Mordecai, but that they be required to litigate with your orators in this bill; and that an account be taken, fair and just and equitable, between the said defendants and your orators upon the said single bill or sealed promissory note and mortgage, and that the said Allen S. Cutts and the said William D. Stewart, administrator as aforesaid, be decreed to pay the same, together with the costs of this suit; and failing to pay the same, that the said mortgaged premises be sold, under the decree of this court, to pay the same, and that the said mortgage to that end be foreclosed; and

after the payment of the debt due your orators, with interest, and all costs and charges due thereon, should any of the proceeds of such sale be left, that the same be turned over to said assignee in
19 bankruptcy, or to said administrator, as to your honors shall seem meet; and that such further and other relief be decreed to your orators in the premises as the nature of the case may require, and to your honors may seem meet:

May it please your honors to grant unto your honors not only the most gracious writ of injunction of the United States issuing out of, and under the seal of, this honorable court, to be directed to the said Allen S. Cutts and the said William D. Stewart, restraining them and each of them from further proceeding in said cases in said circuit court of the United States, under a certain penalty in said writ to be limited, and a like writ of injunction to the said J. E. Burke, assignee in bankruptcy of the said Benjamin Mordecai, restraining him, under a like penalty, from proceeding therein; and the most gracious writ of injunction of the United States issuing out of and under the seal of this honorable court, to be directed to the said William D. Stewart, and the said William D. Stewart, guardian and administrator as aforesaid, the said Thomas J. Stewart, the said Joseph T. Turner and Martha Turner, his wife, the said William C. Dodd and Eliza Dodd, his wife, the said Edward J. Plowden and Matilda Plowden, his wife, and the said Robert M. McMullen, and his agent, the said William D. Stewart; and to the said
20 Barlow & Callaway, Buchanan & Brother, Bloomer & Caldwell, Stewart & Stapleton, David Barwold, Henry C. Daly, Robert T. Byrd, Samuel Cohen, John W. Jordan, W. Travis Weaver, Samuel Anthony, Lewis S. Anthony, Mark Anthony, Patrick Sims, Mrs. Andrew J. Buchanan, Wm. T. Toole, Robert C. Black, Alfred B. Sewell, Jack Brown, James Roach, J. Riley Covington, Wm. Croghan, Victoria Plott, Jno. Brake, Alexander Wheeler, John A. Ansley, Randal Duckworth, Nancy Beard, J. Isaac Hudson, Andrew J. Hamil, & George Andrews, tenants renting the said mortgaged property, commanding and restraining them and each of them, under a penalty in said writ to be limited, from collecting said rents and from paying the same; but also the most gracious writ of subpœna of the United States of America, to be directed to the said William D. Stewart; William D. Stewart, administrator of James Stewart, deceased; William D. Stewart, guardian of Fanny Stewart, Eddy Stewart, and Katy Sewart; Allen S. Cutts, J. E. Burke, assignee in bankruptcy of Benjamin Mordecai; Thomas J. Stewart, Joseph T. Turner and his wife, Martha Turner; William C. Dodd and his wife, Eliza Dodd; Edward J. Plowden and his wife, Matilda Plowden; and Robert M. McMullen, and Barlow & Callaway, Buchanan & Bro., Bloomer & Caldwell, Stewart & Stapleton, David Barwald, Henry C. Bailey, Robert T. Byrd, Samuel Cohen, John W. Jordan, W. Travis
21 Weaver, Samuel Anthony, Lewis S. Anthony, Mark Anthony, Patrick Sims, Mrs. Andrew J. Buchanan, William T. Toole, Robert C. Black, Alfred B. Sewell, Jack Brown, James Roache, J. Riley Covington, William Croghan, Victoria Plott, John Brake, Alexander Wheeler, Jno. A. Ansley, Randal Duckworth, Nancy Beard, J. Isaac Hudson, A. J. Hamil, and Geo. Andrews, thereby commanding them, and every of them, at a certain day, and under a certain penalty therein to be specified, personally to be and appear before your honors in this honorable court, and then and there to answer all and singular the premises, and to stand to, perform, and abide such order and decree therein as to your honor shall seem meet; and your orators shall ever pray, &c.

NISBETS & JACKSON,
Sols. for Complts.

NOTE.—The defendant Allen S. Cutts is required to answer interrogatories 1, 2, 3, 4, 5.

The defendants William D. Stewart, Thomas J. Stewart, Joseph T. Turner & wife, William C. Dodd & wife, Edward J. Plowden & wife, and Robert J. McMullen, are required to answer interrogatories numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28.

NISBETS & JACKSON,
Sols. for Complts.

22 EXHIBIT A.

$44,000.00.

Twelve months after date I promise to pay Allen S. Cutts, or order, the sum of forty-four thousand dollars, with interest from date, for value received.

Americus, Ga., January 8th, 1863.

Witness my hand and seal.

JAMES STEWART. [SEAL.]

Attest:
P. W. WHEATLY.

(Endorsed:) A. S. Cutts. Received on the within note fifteen thousand three hundred and twenty-five dollars, ($15,325$\frac{00}{100}$,) this March 17th, 1866.

Mortgage from Stewart.

GEORGIA, *Sumter County:*

This indenture, made this eighth day of January, in the year eighteen hundred and sixty-three, between James Stewart, of the State and county aforesaid, of the first part, and Benjamin Mordecai, of the State of South Carolina, of the second part, witnesseth:

That the said James Stewart, for and in consideration of fifty dollars, by him in hand this paid by the said Mordecai, at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, as well also as the better to secure the payment of a single bond or bill bearing even date with these presents, made by James
23 Stewart, and payable to A. S. Cutts, or order, and by the said A. S. Cutts endorsed to the said Mordecai, said single bond or bill being under seal and for forty-four thousand dollars, and due twelve months after its date, with interest from its date, have executed, bargained, sold, aliened, and conveyed, and do, by these presents, grant, bargain, sell, and convey & confirm unto the said Benjamin Mordecai, his heirs and assigns, the following town-property, all situated in the city of Americus, Sumter County, Georgia, the following real estate, to wit: the hotel in Americus, Georgia, together with all the appurtenances and land attached thereto, now occupied by Benjamin King; also the large two-story brick store-house on the east side of Johnson street, now occupied by H. R. Johnson & Co., opposite and east of the south end of Jno. V. Price's fire-proof warehouse. This store-house is subject to a mortgage held by Mr. Gibbons M. Taylor for between three & four thousand dollars, principal and interest. Also the two-story brick store-house on east of Johnson street, and south of the last-mentioned premises, now occupied by John W. Wheatley & Robert T. Byrd, together with the respective lots of ground belonging and appertaining to the town-lots upon which they are situated; also the undivided half interest in the

two-story brick store-house known as the Masonic Hall, on the south side Lamar street, next west of Dr. H. C. Bailey's confectionery;
24 also the two-story brick store-house, situate on the south side Lamar street, next east of Dr. H. C. Bailey's store, formerly occupied by Kapp & Dann—this last-named mortgaged T. M. Furlow, but it is believed said mortgage is arranged to be settled—together with all & singular the rights, members, and appurtenances to the said and foregoing houses & lots belonging or in any wise appertaining, with the remainder & remainders, reversion & reversions, rents, issues, and profits thereof, to have and to hold the same to the said Benjamin Mordecai, his heirs and assigns, forever; and the said James Stewart, the above-bargained property unto the said Benjamin Mordecai, his heirs and assigns, will warrant and forever defend the right and title thereto against all claims whatsoever; provided, nevertheless, that if the said James Stewart shall well and truly pay, or cause to be paid, the principal & interest to become due on the within-described note, and all costs that may be incurred in case legal proceedings in case they become necessary to foreclose said mortgage, then this deed to be void; else of force.

In witness whereof I, the said James Stewart, has hereunto set his hand and seal the day and year aforesaid.

JAMES STEWART. [SEAL.]

Signed, sealed, & delivered in presence of—
JAMES J. SCARBOROUGH.
J. W. WHEATLEY, *Notary Public.*

25 GEORGIA, *Sumter County:*

CLERK'S OFFICE, SUPERIOR COURT.

Recorded in book N, page 662, January 10, 1863.

A. G. RONALDSON, *Clerk.*

26 STATE COURT PROCEEDINGS.

MORDECAI
vs.
STEWART.

GEORGIA, *Sumter County:*

To the superior court of said county:

The petition of Benjamin Mordecai sheweth that James Stewart, maker, and Allen S. Cutts, endorser, both of said county, are indebted to him in the sum of forty-four thousand dollars, besides interest, on a single bill or bond, under seal, dated Americus, Georgia, January eighth, (8th,) 1863, and due twelve months after its date, a copy of which is hereto attached, which said bill or bond said James Stewart and Allen S. Cutts refuse to pay. Wherefore your petitioner prays process may issue requiring said James Stewart and Allen S. Cutts, endorsers, to be and appear at the next superior court to be held for said county to answer your petitioner's complaint.

SCARBOROUGH & GOODE,
Plff's Attys.

Copy bill or bond sued on.

$4,400.00.

Twelve months after date I promise to pay Allen S. Cutts, or order, the sum of forty-four thousand dollars, with interest from date, for value received.

Americus, Ga., Jan. 8th, 1863.

Witness my hand and seal.

(Signed) JAMES STEWART. [L. S.]

Attest: J. W. WHEATLEY.

27 Credit endorsed on the back said note:

Received on the within note fifteen thousand three hundred and twenty-five dollars, ($15,325.00,) this March 17th, 1866.

BENJAMIN MORDECAI
vs.
JAMES STEWART, ALLEN S. CUTTS.

GEORGIA, *Sumter County*:

To the sheriff of said county:

The defendants are hereby required, personally or by attorney, to be and appear at the superior court to be held in and for said county on the second Monday in April next, then and there to answer the plaintiff's complaint, as, in default thereof, the court will proceed [as] to justice shall appertain.

Witness the honorable Richard H. Clark, judge of said court, this 17th day of March, 1866.

ANDREW G. RONALDSON, *Clerk.*

[Stamp, 50c.]

GEORGIA, *Sumter County:*

I have this day served each of the defendants with a copy of this writ personally.

AUGS. B. RAIFORD, *Sheriff.*

March 17th, 1866.

No. 58. Sumter superior court, April term, 1866. Benj. Mordecai vs. James Stewart, maker, & Allen S. Cutts, endorser. Original filed in office March 17, 1866. A. G. Ronaldson, clerk. Scarborough & Goode, pltf.'s attys.

28 GEORGIA, *Sumter County:*

To the honorable superior court of said county:

The petition of Benjamin Mordecai respectfully sheweth that a suit in the said superior court is now pending against him and A. S. Cutts, entitled A bill for injunction, & brought by James Stewart; that said bill is returnable to the term of said court for the year , and has not been previously acted upon; that your petitioner is a citizen of the State of South Carolina; that said Cutts is a citizen of the State of Georgia, but not interested in said suit as a defendant against said Stewart, and that said Stewart is a resident and citizen of the State of Georgia; that the amount in said suit exceeds the sum of five hundred dollars, exclusive of costs, and that your petitioner desires to re-

move said suit into the circuit court of the United States for the southern district of Georgia. He therefore herewith tenders the affidavit and bond required by the laws of Congress, and prays the honorable court to accept the security tendered and to grant an order to move said suit into said circuit court.

Oct. 12, '68.

NISBETS,
Attys. for Petitioner.

Due and legal service acknowledged of the within petitions, and of the filing thereof, and all other and further service waived.

Oct 13th, 1869.

W. A. HAWKINS,
Deft.'s Atty.

Filed in office Oct. 13, 1868.

A. G. RONALDSON, *Clerk.*

29 *Petition for removal to U. S. court.*

GEORGIA, *Sumter County:*

To the superior court of said county:

The petition of Benjamin Mordecai respectfully sheweth, that a suit entitled a rule to foreclose a mortgage is now pending in said court, brought by him against James Stewart; that he is a citizen of the State of South Carolina and said Stewart a citizen of the State of Georgia; that the amount in dispute in said suit exceeds the sum of five hundred dollars, exclusive of cost, and that he desires to move the same into the circuit court of the United States for the southern district of Georgia.

Your petitioner therefore tenders herewith the affidavit and bond required by the laws of the United States and prays the honorable court to accept the security tendered and to grant an order to remove said suit into said circuit court.

NISBETTS,
Attys. for B. MORDECAI.

Filed in office Oct. 13th, 1868.

A. G. RONALDSON, *Clerk.*

Bond.

GEORGIA, *Bibb County:*

Know all men by these presents that we, Benjamin Mordecai,
30 principal, and James T. Nesbets, of said county and State, security, are held and firmly bound unto James Stewart in the sum of two thousand dollars, for the payment of which we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Signed and sealed this 14th day of October, 1868.

The condition of this obligation is, that whereas a suit entitled a rule to foreclose a mortgage has been brought by said Mordecai against said Stewart, and is now pending in the superior court of Sumter County, Georgia, which said Mordecai is seeking to move to the circuit court of the United States for the southern district of Georgia: Now, if said suit is moved to said circuit court and said Mordecai shall enter in the said court on the first day of its next term copies of all process, plead-

ings, depositions, testimony, and other proceedings in said suit and all other appropriate acts required by the laws of Congress of the United States of the 27th July, 1866, and the 2d of March, 1867, for the removal of a suit from a State court into the circuit court of the United States, then this obligation to be void; else of full force.

In witness whereof we have hereunto set our hand and seals the day and above written.

BENJAMIN MORDECAI. [L. S.]
JAMES T. NESBETTS. [L. S.]
NESBETTS, *Attys.*

In presence of—
JOHN M. SHEED.
E. P. BEST,
Not. Pub., Bibb Co., Ga.

31 *Affidavit for removal.*

GEORGIA, *Bibb County:*

Personally before me appeared Benjamin Mordecai, who, being duly sworn, deposes and says that a suit is now pending in the superior court of Sumter County, returnable to the term of said court entitled a rule for the foreclosure of a mortgage, in which said deponent is plaintiff and James Stewart is defendant; that deponent is a citizen of the State of South Carolina and that defendant is a citizen of the State of Georgia; that the matter in dispute in said case exceeds the sum of five hundred dollars, exclusive of costs; and that deponent has reason to believe, and does believe, that from local influence he will not be able to obtain justice in said court.

BENJAMIN MORDECAI.

Sworn to and subscribed before me this 11th April, 1868.
R. W. CUBBEDGE. [L. S.]
Notary Public.

Power of attorney from Mordecai.

GEORGIA, *Bibb County:*

I hereby constitute and appoint my attorneys, the Mess. Nesbetts, my agents to file the petition in my name and form, and in my name to execute the bond required by the act of Congress of the 2d of March, 1867, for the removal of the case referred to in the
32 foregoing affidavit from the superior court of Sumter County, Georgia, to the fifth circuit of the United States for the southern district of Georgia, and for m' and in my name to do whatever else may be necessary to be done to effect such removal.

April 11th, 1868.

BENJAMIN MORDECAI.

Signed, sealed & delivered in presence of—
W. HAZELHURST.
R. W. CUBBEDGE, *Notary Public.*

Agreement for hearing on motions.

It is agreed (Judge Clark decreeing on account of relationship to a party in interest to preside) that if Judge Cole does not get to Americus

by 2 o'clock p. m. on Friday the 16th instant, the motions to open the judgments transferring to the United States court the cases in favor of B. Mordecai vs. A. S. Cutts and James Stewart, and the bill filed by the latter against the former in Sumter superior court, shall be heard before Adam R. Brown, esq., a member of the bar of said court, at the court-room in Americus, at two o'clock p. m. on the said 16th day of April, instant, and decided by him. It is farther agreed that if said judgments are opened the motion to transfer said cases shall be heard be-
33 fore the said Adam R. Brown, immediately after the motions to open said judgments are disposed of, unless postponed for providential cause.

Americus, April 15th, 1869.

NISBETTS & JACKSON,
Y. ANDERSON,
Attys. for Mordecai.
W. A. HAWKINS,
Atty. for Stewart & Cutts.

Ordered that the foregoing agreement be entered on the minutes and the cause be heard and by Adam R. Brown, esq., an attorney of this court.

J. M. CLARK, *J. S. C.*
L. W. C.

Dismissal of motion for new trial.

We, Scarborough & Goode, hereby dismiss the above motion for a new trial, and pray that it may be entered on the minutes of Sumter superior court, January 18th, 1867.

SCARBOROUGH & GOODE,
Plff's Atty.

Copy bill or bond sued on.

$44,000.00.

Twelve months after date I promise to pay Allen S. Cutts, or order, the sum of forty-four thousand dollars, with interest from date, for value received.

Americus, Ga., January 8th, 1863.

Witness my hand and seal.

JAMES STEWART. [SEAL.]

Attest:
J. W. WHEATLEY.

Endorsed: A. S. Cutts.

34 Received on the within note fifteen thousand three hundred and twenty-five dollars, ($15,325.00,) this March 17, 1866.

Mortgage from Stewart.

GEORGIA, *Sumter County:*

This indenture, made this eighth day of January, in the year eighteen hundred and sixty-three, between James Stewart, of the State and county aforesaid, of the first part, and Benjamin Mordecai, of the State of South Carolina, of the second part, witnesseth, that the said James Stewart, for and in consideration of fifty dollars, by him in hand

this day paid by the said Mordecai, at and before the sealing and delivering of these presents, the receipt whereof is hereby acknowledged, as well also to secure the payment of a single bond or bill, bearing even date with these presents, made by James Stewart and payable to A. S. Cutts, endorsed to the said Mordecai, said single bond or bill being under seal, and for forty-four thousand dollars, and due twelve months after its date, with interest from its date, have executed, bargained, sold, alienated, and conveyed, and do by these presents grant, bargain, sell and convey and confirm unto the said Benjamin Mordecai, his heirs and assigns, the following town-property, all situated in the city of Americus, Sumter County, Georgia, the following real estate, to wit:

The hotel in Americus, Georgia, together with all the appurte-
35 nances and land attached thereto, now occupied by Benjamin King; also the large two-story brick store-houses on the east side of Johnson street, now occupied by R. R. Johnson & Co., opposite and east of the south end of Jno. V. Price' fire proof warehouses. This store-house is subject to a mortgage held by Mr. Gibbons M. Taylor for between three and four thousand dollars, principal and interest. Also the two-story brick store-house on east side of Johnson street and south of the last-mentioned premises, now occupied by John W. Wheatley and Robert T. Byrd, together with the respective lots of ground belonging and appertaining to the town-lots upon which they are situated. Also the individual half interest in the two-story brick store-house known as the Masonic Hall, on south side Lamar street, next west of Dr. H. C. Bailey's confectionery. Also the two-story brick store-house situated on south side Lamar street, next east of Dr. H. C. Bailey's store, formerly occupied by Kapp & Dann—this last-named property was mortgaged T. M. Fulton, but it is believed said mortgage is arranged to be settled, together with all and singular the rights, members, and appurtenances to the said and foregoing houses and lots belonging or in anywise appertaining, with the remainders and remainders, *revisions* and *revisions*, rents, issues, and profits thereof, to have and to hold the same to the said Benj. Mordecai, his heirs and assigns, forever. And the said James
36 Stewart, the above-bargained property unto the said Benjamin Mordecai, his heirs and assigns, will warrant and forever defend the right and title thereto against all claims whatever; provided, nevertheless that if the said James Stewart shall well and truly pay, or cause to be paid, the principal and interest to become due on the within-described note, and all cost that may be incurred on case legal proceedings, in case they became necessary to foreclose this mortgage, then this deed to be void; else of force.

In witness whereof I, the said James Stewart, has hereto set his hand and seal the day and year aforesaid.

JAMES STEWART. [L. S.]

Signed, sealed, and delivered in presence of J. Scarborough.
J. W. WHEATLEY, *Not. Pub.*

CLERK'S OFFICE, SUPERIOR COURT.

GEORGIA, *Sumter County:*

Recorded in books N, page 662, January 10th, 1863.

A. G. RONALDSON, *Clerk.*

37 *Bill of sale.*

Col. A. S. Cutts bought of B. Mordecai:

1863.		
January 6.	To 220 G. & Pensacola 220 R. R. bonds, $500 each, @ 80c	$88,000 00
	To 220 coupons payable 1st July, 1861, ea. $20.00	4,400 00
	To interest, $4,400, No. 6, Jany., 1863	533 60
	To 220 coupons payable 1st January, 1862, each $20.00	4,400 00
	To interest on same to 6th Jany., '63	357 86
	To 220 coupons payable 1st July, 1862, each $25.00	4,400 00
	To interest on same to 6th January, 1863	181 56
	" 220 coupons payable 1st of January, 1863, each $20.00	4,400 00
	To interest to 6th January, 1863	5 87
		$106,679 19
	Deduct cash	12,679 19
		$94,000 00
	Mortgage	44,000 00

BANK OF THE STATE OF SOUTH CAROLINA,
Columbia, Dec. 19th, 1862.

A. S. Cutts, esq., Americus, Ga.:

DR. SIR: Your favor 16th inst. rec'd. I will accept the proposition made me, viz, that Mr. Stewart will give me a mortgage upon the
38 property proposed, provided it is worth the amount which he proposes to secure me for, and that it is covered by insurance and said policy assigned. Should I have occasion to sell property to re-imburse myself and it falls short the amount of his indebtedness, I shall of course expect to hold him for the balance. I understand this to be his proposition. The balance of fifty thousand dollars, I shall be willing to take the title of the Geo. & Pen. R. Road Co. for fifty thousand acres of land, as stated in your letter. This I understand to be your meaning, which gives me pleasure to comply with. With this understanding I will be with you the first week in January next. I cannot be with you before; if, in the mean time, you make sale of any of the land, you can account to me when I see you. When I leave here I will deposit the bonds with the So. Western R. R. Bank, subject to my order, in favor of Houston Pt.

Write me if this is our understanding.

Your obedient servant,

B. MORDECAI.

Brief of evidence in Mordecai vs. Stewart.

B. MORDECAI *vs.* JAMES STEWART. } Rule nisi to foreclose mortgage. Traverse verdict & motion for a new trial.

By pl'ff:

First. The rule nisi regularly sued out and personally served
39 on defendant.

Second. Note and mortgage for forty-four thousand dollars, ($44,000.00,) both date January 8th, 1863, and mortgage recorded in proper office January 10th, 1863.

Here plaintiff ceased.

Defendant then read in evidence, over and against objection of plaintiff' counsel, a letter purposing to be written by plaintiff to A. S. Cutts, dated Columbia, Dec. 19th, 1862. Plaintiff's signature to said letter was proven. A. S. Cutts was sworn not as a party, but upon release by Stewart and depositing the cost, and testified that the 4,400$ note and mortgage was given for Ga. and Pensacola R. R. bonds, and testified and identified a bill of particulars or sale dated January 6th, 1863, of items of plaintiff against said Cutts amounting, aggregately, to $106,679.19, and this note was given for bonds of the Geo. & Pen. R. R. Co., which was suing for confederate money at 80 cts. on the dollar; the bonds had been previously sold by witness to Mordecai at 70 cts. on the dollar before the war; witness had been paid for them by Mordecai at this rate. By getting these bonds from Mordecai witness obtained possession of (50,000) fifty thousand acres of Florida lands, then and now worth $2.50 per acre; though witness insist' that he had a legal claim to these lands and, as he believes, could have compelled the company to give him possession of them if he had had time to do so. The ruling rate of
40 market-value of these bonds at the time the vote was given was 80 cts. on the dollar in confederate money.

A payment was made $153; 25.00 in Florida land, at $2.50 per acre, about the value of said lands, 12,619 acres of said lands being at said rates paid partly some other claims. The transaction was a confederate one, made at the time it purports to be in the bill of particulars. The $12,000 owed and paid in confederate money, the $50,000 was soon thereafter paid in confederate money, as is stated in the bill of particulars. The land before the war was worth $2.50 in good money per acre; the land was no part of this purchase; he bought the bonds to avoid litigation with the railroad co., about the lands, as he was in the war and embarrassed at home, and could not attend to a settlement of the matter with the R. R. co. The other claim of plaintiff on which a payment was made at the credit of the note was not connected with the claim; $15,125 worth of said Florida lands were paid on this note. These were the lands the possession of which was obtained as above stated. The reason why witness did not before make any resistance to the payment of this debt and the other debts in which he claimed there was usury, he was in the army and embarrassed at home, and would have done anything not involving principal to save Mr. Stewart, his friend,
41 and prevent litigation; the consideration for which the note and mortgage was given as before stated was Geo. & Pen. R. R. bonds.

Plaintiff then introduced in rebuttal Col. C. W. Charlton, who, being duly sworn, testifies that in September last he proposed to purchase from the defendant hotel lot and buildings, (covered by said mortgage;) that Stewart refused to sell or agree to sell until Col. Cutts had agreed to advance $7,000 to Stewart in place of $7,000 to be paid to Mordecai to release the mortgage on said property, (hotel and lot.)

The parties Charlton, & Stewart, and Cutts, requested C. T. Goode, esq., atty. for Mordecai, to write to him and get authority to release the mortgage on said hotel on payment of $7,000, and a mortgage on 1,000 acres of Missouri land, its estimated market-value, which was done. The parties calculated with Col. Goode the market-value of the other

property embraced in the mortgage, and all the parties came to the satis factory conclusion that there would be just about enough property to pay the amount called for in the face of the note and mortgage. The written agreement and the endorsement on its back by the attorneys of Mordecai here introduced. Col. Cutts agreed to re-imburse Stewart for $7,000, purchase-money, which was to go to Mordecai in case
42 he could not make arrangements with Mordecai; but the extent of the understanding on the part of Cutts was merely to release the property of the incumbrance of the mortgage in some way.

Col. M. R. Stansell, sworn for the plaintiff, testified that in Dec., 1862, and January, 1863, corn was selling in confederate money from one dollar to one dollar and a half per bushel and bacon from 18 to 22 cents per pound less than the present prices in greenbacks. Witness bought and sold these articles. At that time the rate for gold was three for one, and merchandise was higher than gold. In 1864, gold was 20 for 1; corn, $7.00 per bushel, and meal 31 per pound.

William D. Stewart, sworn for plaintiff, testified that at the October term, 1866, James J. Scarborough, one of plaintiff's attorneys, had witness called, who was agent of his father, (the deft.,) and said Scarborough asked him if he or his father had any objection to making the rule nisi absolute, and witness told Scarborough that neither he nor his father had any defence, as he knew of. He had a conversation with plaintiff in 1866, and plaintiff said the note and mortgage was given for confed. consideration, for $88,000 bonds rated at 80 per cent. confed. money in the dollar.

James J. Scarborough, sworn for the plaintiff, testified that at the time (17th March, 1866) of the payment of the $150,325.00 on said
43 note Col. Cutts sold to plaintiff 1,200 acres Florida lands in the counties of Columbia and Suwannee (as he believes in these counties) at $2.50 per acre, and a bond or inchoate deed was taken from Cutts to plaintiff; that no number, township, or range was mentioned therein; that Cutts had a platt of the lands with some that he had sold marked upon it; that plaintiff was to have his choice of the unsold lands and to send an agent to examine them within 2 months, and then Cutts was to execute a good deed description of the lands; that plaintiff or his agent had not within his knowledge made said selection, and that he had no doubt if he had done so Cutts would have executed the proper deed, and that the amount of the sale of the lands by Cutts to plaintiff was $30,000, a portion of which was applied to other claims of Cutts and $15,325.00 as a credit or partial payment on the note secured by the mortgage.

GEORGIA, *Sumter Co.:*

We consent and agree that the foregoing is a substantial brief of the oral evidence taken in said cause and consent that all documentary evidence issued on the trial may be issued for the purpose of motion for new trial.

SCARBOROUGH & GOODE, *Plfts Attys.*
McKAY & HAWKINS, *Deft.' Attys.*

44 Filed in office 21st Dec., 1866.

A. G. RONALDSON, *Clerk.*

This brief of evidence is approved and ordered to be filed and a certified copy of it be made out by the clerk of this court, including *of* copy of the documentary evidence, this 21st Dec., 1866.

D. A. VASONS.

Motion for a new trial.

BENJAMIN MORDECAI *vs.* JAMES STEWART. } Rule nisi to foreclose mortgage on real estate in Sumter superior court; issue and trial before a special jury and verdict for defendant.

The defendant and his counsel are hereby notified to show cause, so soon as counsel can be heard, why the verdict of the jury in the above cause shall not be set aside and a new trial granted on the following grounds:

1st. Because James J. Scarborough and Charles T. Goode, as attorneys for plaintiff, understood distinctly that they had made before the trial of the case a distinct motion for a continuance upon the ground of the absence of their clients, whose presence was indispensable necessary to a fair and just investigation of his case, and on the further ground that they consider that the case had been finally disposed of at regular session of the court last October, this being the adjourned term;
45 in consequence of which had had no correspondence or intercourse with the plaintiff since the October term, and which was overruled; and because said Scarborough & Goode, pl'ff's attorneys, now state in their place that they have private reasons to believe and to be satisfied that said plaintiff has in possession most important and material evidence in his favor, and which, if submitted to the jury, would be controlling, and which they expect to get at at another trial; that Mordecaci is, as they understand, a competent witness under the sale act of the legislature, and as one of the parties deponent was sworn for the defence, they desire the opportunity of introducing the plaintiff on a new trial.

2d. Because the court erred in allowing a letter of the plaintiff to A. S. Cutts, dated Columbia, December 19th, 1862, to be read in evidence, over and against objections thereto taken by plaintiff's counsel, plff.' counsel taking two objections to it, because it was not only part of a correspondence or conversation between Cutts and plaintiff, and needed Cutts' letter to a full understanding of the entire correspondence; and second, that it was one in the nature of a compromise.

3d. Because the court erred in admitting, over objections of plaintiff's counsel, A. S. Cutts as a witness, he being the meritorious defendant, though not a party.

46 4th. Because after said Cutts was introduced, testified, and identified a paper, being a bill of particulars or sale of said railroad stock by plaintiff to A. S. Cutts, who testified said note and mortgage *was* given for Geo. & Pensacola R. R. bonds, specified on said sale-bill, which is dated January 6th, 1863, plaintiff's counsel moved to withdraw the case, and continue the case on account of surprise, and the court erred in overruling the motions.

5th. Because the court erred in refusing to give in charge to the jury the first written request of plaintiff' counsel, viz, that the ordinance of the convention upon which defendant relies is a violation of the constitution; that the legislature, and not the convention, is the law-making power, and that said convention had no right to pass any such an ordinance. Refused. D. A. V.

6th. Because the court erred in refusing to give in charge the 2d written request of plaintiff's atty., viz, that if the court shall be of opinion said ordinance is binding and operative, yet if the jury believe Col. Cutts' evidence that the note and mortgage were given for Ga. & Pensacola R. R. bonds, which he bought of Mordecaci, by which he obtained titles to near about 100,000 acres of Florida lands, worth $2.50 per acre,

then and in that case the note and mortgage is not intended to be included within the ordinance.

7th. Because the court erred in refusing to charge the jury plaintiff's 3d written request, viz, that if the jury believed the note and
47 mortgage for Geo. & Pensacola Railroad bonds which were of value to Col. Cutts, the consideration is a valid one, the law not looking closely to the quantum of the consideration; so that it is lawful and of value to defendant.

8th. The court erred in refusing to give in charge to the jury the 4th written request, as requested *viz* plaintiff's counsel, viz, that it is incumbent on the defendant to show by proof, even under the ordinance, what sort of currency the note and mortgage were to be paid in; that if he has failed to do so, the law presumes the payment was to be paid in a legal, constitutional currency, and that the defendant must be held down to his sworn plea; if he has paid, to show what kind of currency the note was to be paid in, the jury ought to find the full amount due, deducting the $15325 credit.

9th. The court erred in refusing to give plaintiff's counsel 5th written request in charge to the jury, viz., the value of confederate money has, under the proof in this case, nothing to do with the question before them, and instead then of telling the jury they would inquire into the value of the confederate money at the making the note and its maturity, and all intermediate dates.

10th. The court erred in refusing to give the 6th written request of plaintiff' request in charge, as requested, viz, that there is no want of failure of consideration pleaded, and defendant must abide by
48 his plea or answer, and in telling the jury in lieu thereof that payment had been relied on in argument.

11th. The court erred in not giving in charge to the jury, as requested, the 3rd written request of plaintiff's, viz, that in relation to the payment on the note of 15325 it is an executed partial payment, and must be held as paid for that amount only, and no part of it can be carried over or against the balance due on the note unless there was an agreement it should be accepted in full payment; and further, that said pay't is evidence of a good, valid, subsisting debt at the time it was made.

12th. The court erred in telling the jury that, in relation to the consideration for which the note was given and what it was to be paid in, the court did not know that the burden of proof devolved on either party, but either might show it if he could or desired it.

13th. Because the court, upon verbal request of Mr. Goode, one of plff.'s attys., refused to charge the jury that if the bonds, the consideration of the note sued on, were worth at the time the note was given as much as the face of the note calls for in greenbacks, the jury should find the full amount for the plaintiff; and that if the bonds at the time of the sale when this note was given could have been sold for $44,000 in confederate money—could have purchased more of the usual commodities of commercial traffic than the plaintiff could now pur-
49 chase with full amount of the note in greenbacks—the verdict of the jury should be for the full amount claimed by the plaintiff.

14th. Because the court erred in giving the jury in charge as follows: The defendant set up that this mortgage-debt has been paid or discharged, and to show this he sets up that this an executed contract made during the late war, and is subject to be so called, according to the provision of the acts of the convention of the State of Georgia. If you are satisfied from the evidence that the intention of these were that this debt was to be paid in the currency then in circulation, then you

have the right to so call this debt and fix the amount in our currency at this time of the debt the rule to be adopted by you in fixing. This amount under said ordinance depends upon the view you may take of the facts of the case. If you believe it was the intention of the parties that the plaintiff took the risk of the rise or fall in the value of confederate money from the making to the maturity of the note, then you ought to execute the contract as near as you can, as the contract matured in 1864. If defendant had tendered the confederate money at that time, and the plaintiff refused to accept it, this would have discharged the defendant; but as it is not pretended here there was a tender, then the plaintiff is entitled to so much in the present currency as is equal to the value of confederate money at that time. To
50 find out the value of confederate money at that or any other time, you may either take the broker's note of gold in confederate money, with the discount of depreciation of our paper currency added thereto, or you may take any other standard furnished to you by the evidence in this case for that purpose. I have allowed testimony to go before the jury showing the value of corn and other property. You can, if you please, reduce the value of the currency at that time from this source. But should you believe that this result could not be equitable and just to either party according to the facts of this case, then you may take the value of confederate money at the time of the making of this note, to be ascertained as above explained; and beside this you may (if it does not violate the terms of the contract as agreed upon as before stated) take into consideration the value of the consideration received by Col. Cutts from plaintiff for this note and adjust the equities of the parties by this method. But you ought to discard this if you believe that the true agreement of the parties was that Cutts was to pay the note in confederate treasury-notes 3 as to the credit entered on the note, where you will find out, if you can, what was the agreement of the parties in relation to the same, and carry it out. If you are not satisfied from the evidence as to the intention of the parties, then you will find out from the evidence how this payment was made, and charge plaintiff with
51 the value of the same in our present currency. To the whole of the above charge we allege error, but especially that the court erred in assuming from first to last in said charges the note, the foundation of the mortgage, was a confederate contract; 2. Because the judge assumes it was to be paid in confederate money, when there was no such evidence; 3. Because the court erred in that part of his charge. Besides this, you may, if it does not violate the terms of the contract agreed upon as before stated, take into consideration the value of the consideration received by Col. Cutts from plaintiff for this note and adjust the equities of the parties by this method. But you ought to discard this if you believe the true agreement of the parties was that Cutts was to pay the note in confederate treasury-notes. There was no such agreement proven, no evidence upon the subject of what the note was to be paid in except that upon the face of the note itself. 4. The court erred in its charge in regard to the credit entered upon the note, and in charging the jury to find out, if you can, what was the agreement of the parties in relation by said credit, and carry it out. If you are not satisfied from the evidence of the parties, then you will find out from the evidence how this payment was made and charge plaintiff with the value of the same in our present currency, when there was pointed proof introduced said credit was a partial payment, and in Florida lands
52 estimated at $2.50 per acre. 5. The court erred in that part of its charge in telling the jury, if you believe it was the intention

of the parties that the plaintiff took the risk of the rise or fall in value of confederate from the making to the maturity of the note, then you ought to execute the contract. There was no such contract proved; the charge assumed, and misled the jury. The court erred again in binding the plaintiff's right to the value in confederate money, assuming a confederate agreement outside the evidence, and in all that part of the charge about a tender, or it was outside the evidence, and each and all and every part of the charge relative to finding out the value of confederate money. Because the jury found contrary to law; because the jury found contrary to evidence, the weight of the evidence, without evidence, and against the equity and justice of the case.

Amended motion.

And lastly, since the trial plaintiff's counsel have discovered material and important evidence of their client, who was absent and could not get to court, they being of the opinion the case was passed or continued for the term, and were forced to trial in his absence. See Benjamin Mordecai's affidavit hereto appended.

SCARBOROUGH & GOODE,
Plaintiff's Attorneys.

53 We acknowledge service of the within and above motion for new trial January 12th, 1867.

H. H. McCAY,
W. A. HAWKINS,
Defendant's Attorneys.

Plea to rule nisi to foreclose mortgage.

BENJAMIN MORDECAI
vs.
JAMES STEWART. } Rule nisi to foreclose mortgage.

And now comes defendant and for plea says the note which said mortgage was given to secure was given [by (?)] him to said plaintiff as security only for Allen S. Cutts, the endorser thereon, and for his, said Cutts', accommodation. This was well known to the plaintiff at the time, and defendant now in fact says that before the commencement of said suit said Mordecaci was indebted to said Cutts twenty-five thousand dollars for usurious interest before that time paid by said Cutts to said Mordecaci, as will more full appear by a bill of particulars hereto attached.

McCAY & HAWKINS,
Defendant's Attorneys.

B. Mordecaci dr. to Allen S. Cutts.

Bill of particulars.

54 1858.—To amount paid on the 20th of December, 1858, for usury on forbearance *duly* for one year over all legal interest on amount due you, to wit, on 40,000 for one year past..... 5,000 00

20th Dec., 1869.—To amount paid you for forbearance and delay of amount due you above all legal interest for one year, to wit, 1859, on 50,000..... $10,000 00

To amounts paid at various times on various amounts from 1st Jany., 1856, to 1st of Jany., 1860, for usury for forbearance loan of money over and above the legal rate of seven per cent..... $10,000 00

Dismissal of case of Mordecai vs. Stewart.

BENJAMIN MORDECAI
vs.
JAMES STEWART.

Application to foreclose mortgage on real estate in Sumter superior court, issue and verdict, at October adjourned term, 1866, to wit, Dec., 1866.

We, Scarborough & Goode, plaintiff's attorneys, do hereby dismiss the above sealed motion, which was ordered to be heard at Lee court 4th Monday in January instant, and pray that this may be entered in the minutes of Sumter superior court.

January 18th, 1867.

SCARBOROUGH & GOODE,
Plaintiff's Attorneys.

Sumter superior court, October term, 1867, October 14th, 1867.

55 *Judgment of supreme court.*

STATE OF GEORGIA,
Milledgeville, Saturday, 29th, 1867.

The honorable the supreme court met pursuant to adjournment. Present. their honors Hiram Warner, Dawson A. Walker, & Iverson L. Harris, judges.

BENJAMIN MORDECAI
vs.
JAMES STEWART. } Plff. in error.

This case came before the court upon a transcript of the record from the superior court of Sumter County, and, after argument had, it is considered and adjudged by the court that the judgment of the court below be reversed and a new trial ordered. Where parties make an agreement, by which one pays and the other receives a certain amount, and which amount is entered as a credit on a promissory note, the note is extinguished pro tanto, and the remainder due upon the note stands unaffected by the entry of the credit, the amount thus credited cannot be enlarged in the absence of any agreement of the parties so as to extinguish a greater monied amount named in the credit in this case; the credit of $15,325 extinguished that amount, one of the note leaving the remainder unaffected in anywise by it.

Bill of cost: Ca'ing case to judgment, $6.00; received ass's, $6.00; remitted, $1.25; shff., $1.25—$15.25.

56 Supreme court of the State of Georgia, June term, 1867.

I certify that the above is a true extract taken from the minutes, and that J. J. Scarborough paid the above bill of cost.

Given under my hand and seal of office.

[L. S.] CHARLES W. DUBOSE, *Clerk.*

Order of Sumter sup'r court as to remitter.

Sumter superior court, October term, 1867.

The within stated case of Benjamin Mordecaci, plaintiff in error, vs. James Stewart, defendant, having been carried to supreme court, and the remitter having been returned, reversing judgment of the court below, it is ordered the judge (?) of the supreme court be made the judge (?) of this court, and that both remitter and this order be put upon the minutes, and that Benjamin Mordecaci do recover of James Stewart for recording this order, costs having been paid.

D. A. VASON,
J. C. S. W. C.

Stewart's defence to foreclosure of mortgage.

B. MORDECACI *vs.* JAMES STEWART & ALLEN S. CUTTS. } Rule nisi to foreclose a mortgage. October term, 1867.

57 BENJAMIN MORDECACI *vs.* JAMES STEWART. } Complaint.

And now at this term comes the defendant, and says that said mortgage ought not to be foreclosed, because he says that said note was made by him for the accommodation of A. S. Cutts, and this defendant was not interested in the consideration, but was in fact the security of A. S. Cutts, the nominal endorser, and that defendant must here, in fact, says that he is informed and believes, before and at the time of the granting of said rule nisi, the said Mordecaci was, and now is, justly indebted to said A. S. Cutts in the sum of fifteen thousand dollars for interest paid by said Cutts for the loan of money and for forbearance, as will more fully appear by a bill of particulars heretoattached; and defendant says that said Cutts has consented, and does consent, that this defendant may set up, and in this account, as a defense against this foreclosure, and has transferred the said account to him; and this defendant here also alleges that said Mordecaci is not a resident of the State of Georgia, and this defendant has no means of recovering said account except by defence to said foreclosure; and the said Allen S. Cutts here now, by the consent of this defendant and with his own consent, hereby agree' to be a party to this proceeding.

58 *B. Mordecaci dr. to A. S. Cutts.*

1858.—To amount paid for indulgencies on debt due over and above all legal interest & charges.....	$5,000 00
1859.—To amount paid you for indulgencies on debts due over and above all legal charges.....	$10,000 00
	$15,000 00

GEORGIA, *Sumter County:*

Before me this day comes James Stewart, who, on oath, says that the facts set forth in the within "pleasuret ime," (?) so far as they are stated

are depended on his own knowledge, are true; so far as they are stated or depend on the knowledge or deeds of others, he believes to be true.

JAMES STEWART.

Sworn to and subscribed before me this 14th December, 1867.

W. H. BREWER, *J. P.*

Plea filed October 16th, 1867.

A. G. RONALDSON, *Clerk.*

Petition for rule nisi.

GEORGIA, *Sumter County:*

To the honorable superior court of said county:

The petition of Benjamin Mordecaci respectfully showeth that heretofore, to wit, on the eighth of January, 1863, James Stewart made
59 and delivered to one Allen S. Cutts his single bill, or promissory note, under seal of that day, whereby the said Stewart, twelve months after date thereof, promised to pay said Cutts or order forty-four thousand dollars, with interest from date of said bill or note the said Cutts duly endorsed and delivered to petitioners on the said day, and to secure the payment of the said note the said James Stewart afterwards, to wit, on the same day and year aforesaid, made, executed, and delivered to your petitioner his mortgage-deed of the date 8th January, 1863, upon the following town property, all situated in the city of Americus, Sumter County, Georgia, all real estate, to wit: The hotel in Americus, Georgia, together with all the appurtenances and land attached thereto, then occupied by Benjamin King; also, the large two-story brick house on the east side of Johnson street, then and now occupied by H. R. Johnson & Bro., affronts and east of the south end of John V. Price's fire-proof warehouse, now burned down. This store-house was then subject to a mortgage held by Gibbons M. Taylor, but which has been paid off since. Also, the two-story brick store-house on the east side of Johnson street and south of the last premises, then occupied by John W. Wheatley and Robt. T. Byrd, together with the respective lots ground belonging to same lot and appertaining to the same. Also,
60 an individual half-interest in the two-story brick house known as the Masonic Hall, on the south side of Lamar street, next door west of Dr. H. C. Bailey's confectionery; also the two-story brick houses and lot situated on the south of Lamar street and east of Dr. H. C. Bailey's confectionery, formerly occupied by Knapp & Dann, together with all and singular the rights, members, and appurtenances appertaining to said town lot, which mortgage-deed has been duly recorded and is now here, together with said bill or note shown to the court; and petitioner further shows that on the 17th day of March, 1860, there was due and unpaid on said mortgage the full sum of thirty-seven thousand nine hundred and seventy-two dollars and thirty-three cents principal, besides interest from the latter day till paid.

Wherefore your petitioner prays a rule nisi may issue to foreclose said mortgage, calling on the said mortgager to pay principal, interest, and costs of these proceedings into this court on or before the first day of the next term of this court, or else then and there show cause why the equity of redemption of, in, and to the mortgaged premises should not be barred and foreclosed.

SCARBOROUGH & GOODE,
Petitioner's Attorneys.

Upon hearing the foregoing petitioner and the exhibitions of the within-described mortgaged and single-bill interest, it is ordered James Stewart do pay into this , on or before the first day of the
61 next term of this court, the sum of thirty-seven thousand nine hundred and seventy-two dollars and thirty-three cents, principal sum, with interest thereon from 17th March, 1866, and also the cost of these proceedings, or else show cause why the equity of redemption of, in, and to the premises described in the foregoing petition shall not [be] barred, thereafter barred and foreclosed, and that said Stewart do have due notice of this application and rule nisi by the court.

SCARBOROUGH & GOODE,
Plaintiff's Attorneys.

Extract from minutes G, Sumter superior court, page 415 & 416.

Plea of defendant.

Rule nisi to foreclose mortgage. Sumter superior court, Oct. adj. term, 1866.

BENJAMIN MORDECACI
vs.
JAMES STEWART.

And now at this term comes James Stewart, the defendant, and says that plaintiff ought not to have his mortgage foreclosed for the amount claimed by him to be due thereon, because he says that the said note, for the security of which said mortgage was given, was made between 1st of January, 1861, and the 5th of June, 1868, and the defendant claimed the right to have the value of the currency in which the same was to be paid, and that the amount due thereon ought to be
62 fixed upon principle of equity.

BENJAMIN MORDECACI
vs.
A. S. CUTTS & OTHERS. } Comp't in Sumter superior court.

BENJAMIN MORDECACI
vs.
A. S. CUTTS & OTHERS. } In equity. Sumter superior court.

It appearing to the court that on the sixth day of February, 1869, during the present term of this court, the plaintiff in the above-stated causes, that this court, upon the application of plaintiff the said several causes above stated, granted an order in each of said causes that each of said causes be removed from this court to the fifth circuit court of the United States for the southern district of Georgia, as in petition therein prayed for, and that said plaintiff enter in said fifth circuit court of the United States for the said southern district of Georgia, on the first day of its session, copies of all processes, pleadings, depositions, testimony, and other proceedings in this court, and do all other and appropriate acts required by the laws of Congress of the United States for the removal of a suit from a State court into the circuit court of the United States; and, further, that plaintiff pay the costs which has accrued in said causes prior to its removal, and such further cost as may

be incurred by its removal as aforesaid. And it further appear-
63 ing that said orders were improvidently granted at said time, and in violation of the defendants' rights, in this, that at the time of the granting of said order, Richard F. Lyon, counsel for the defendant', was absent from the court by leave of the court, and by consent of all the bar in attendance upon the court when said leave was granted; and it further appearing that said Lyon, when said motion was called, was absent from the court by leave thereof, as affirmed, believed from evidence that was satisfactory to him had adjourned for the term, and that counsel for the plaintiff, knowing that he labored under that belief, and with a full knowledge by a direct communication from the judge of the court by letter that this was not true, failed to deliver to said Lyon such direct and positive information, although the letter of the judge was in reference to taking up this motion at the time said orders were passed, with the requirements therein that notice of the court intended to take up and try this particular motion should be given to said Lyon as a condition-precedent to the taking up the same, which particular and especial notice the said attorney of the plaintiff failed to give said Lyon in time to enable him to be present at the hearing, although full opportunity was had for that purpose; and notwithstanding such failure to give such required , said counsel represented to the court that
64 the required notice had been given, when in truth it had not been given, in consequence alone of which representation the court was *ad*duced to take up and hear said motion, upon the belief that said Lyon had had the required notice, could have attended but would not; wherefore it is ordered by the court that the plaintiff show cause instanter, or as soon as counsel can be heard, why said several orders should not be rescinded, vacated, and decreed null and void, and a new hearing had upon the same; and that in the mean time that said orders be suspended and superseded; and that the clerk of this court be, and he is hereby, directed not to deliver to said plaintiff or his attorney any of the papers of the causes or any certified copies of the records and proceeding of said causes, so as to enable the plaintiff to transfer said causes to the fifth circuit court of the United States for the southern district of Georgia for trial until the further order of this court in the premises.

J. M. CLARK,
J. S. C. S. W. C.

Motion to rescind.

B. MORDECACI
vs.
A. S. CUTTS ET AL.

Plaintiff's counsel not being in court, it is ordered that the above and foregoing motions be continued until the next term, and that in the mean time the plaintiff's counsel be served with a copy of this rule.

J. M. CLARK,
J. S. C. S. W. C.

65 And of this he puts himself upon the country.

H. K. McKAY.
W. A. HAWKINS.

GEORGIA, *Sumter County:*

In open court comes James Stewart and says the facts stated in the above deed (?) are true.

Sworn to in open court.

J. B. PILSBURY,
Defendant's Clerk. (?)

GEORGIA, *Sumter County:*

I have this day served the defendant personally with a true copy of this rule nisi.

June 2d, 1866.

AUGT. B. RAIFORD, *Shff.*

BENJAMIN MORDECAI
vs.
JAMES STEWART. } Rule nisi.

We, the jury, find for the defendant.

ASBURY A. ADAMS,
Foreman.

Names of the special jurors in the above case: A. A. Adams, S. G. Pryor, Jessy Hardy, R. A. Brown, R. M. Dozier, Moses Renea, T. V. Hyde, Thomas Eden, Francis Forth, Eugene Wilson, Jas. M. Bradfield, Martin G. Brady.

Application to foreclose mortgages on real estate.

66 BENJAMIN MORDECACI
vs.
JAMES STEWART. } Verdict for defendant.

A motion for new trial, the brief of evidence having been agreed upon by plaintiff and defendant's counsel and approved by the court, and a notice for a new trial filed, it is on motion of counsel ordered that deft.' counsel show cause at Lee superior court, 4th Monday in January next, why a rule nisi should be granted in said case, and that the presiding judge have leave to perfect the grounds of error alleged, and that the plaintiff's atty. to be allowed until then to amend their grounds for new trial.

D. A. VASON,
J. M. S. W. C.

B. MODECACI
vs.
JAMES STEWART, PRINCIPAL, & A. S. CUTTS, security.

Rule nisi and motion to foreclose mortgage & issue before special jury, Oct. adj. term, 1866.

The jury in this case having rendered a verdict for defendant in this case, and having found that said note of ($44,000) dollars (?) forty-four thousand dollars, dated January 8th, 1863, and due twelve months after date, made by said Stewart, endorsed by said Cutts, and secured by mortgage on real estate in the city of Americus, were fully paid off and discharged, it is therefore considered and adjudged by the court that the said note and mortgage be filed in this office as paid and
67 satisfied, and that defendant recover of plaintiff, B. Mordecaci, sum for cost in this behalf.

D. A. VASON,
J. S. C. S. W. C.

B. MORDECAI
vs.
JAMES STEWART, PRIN., ALLEN S. CUTTS, endorser.
} Rule nisi to foreclose a mortgage, issue, verdict, and motion for new trial.

Returnable to Judge Vason, at Starkville, 4 Monday Jan'y, 1867.

The plaintiff having withdrawn his application for a new trial in this case, it is ordered that the same be allowed, and that the defendant recover from the plaintiff the sum of dollars for his costs, and that the clerk of the superior court of Sumter County enter this order on the minutes of the court.

D. A. VASON,
J. S. C., S. W. C.

BENJAMIN MORDECAI
vs.
JAMES STEWART.
} Application to foreclose mortgage on real es tate. Verdict for defendant and motion for new trial.

The brief of evidence having been agreed upon by plaintiff and defendants' counsel & approved by the court, and a motion for a new trial filed, it is ordered that defts.' counsel show cause at Lee superior court 4th Monday in January next why a rule nisi should be granted in said case, and that the presiding judge have leave to perfect the grounds of error alleged, and that the plaintiff's attorney be allowed until
68 then to answer their grounds for new trial.

D. A. VASON,
J. S. C., S. W. C.

STATE OF GEORGIA,
County of Sumter:

To the honorable David A. Vason, judge of the superior courts of the southwestern circuit, holding jurisdiction in chancery:

Your orator, James Stewart, of said county, humbly complaining, sheweth unto your honor, on or about the 6th day of January, 1863, at the solicitation of Allen S. Cutts, then and now of said county, he agreed to lend to said Cutts his name to give him credit in a certain transaction at that time entered into between the said Cutts and one Benjamin Mordecai, of the State of South Carolina; that said Cutts bought of the said Mordecai a large amount of bonds of the Georgia & Pensacola Railroad, amounting in all to the sum of about one hundred and six thousand dollars, or other such sum, as will appear by an account stated of said sale hereto attached, marked "A," rendered and made out at the time by said Mordecai; that the price agreed by said Cutts to be paid for said bonds was at the market-price of said bonds in confederate money, being, to wit, 80 cents on the dollar in confederate money; that said bonds were then at a discount even for confederate money, because the company were unable and refused to pay the interest-coupons even in
69 the inflated currency then in circulation; that said Cutts paid to said Mordecai twelve thousand dollars in cash in confederate money on said transaction, gave his individual note, due at 60 or 90 days, for fifty thousand dollars, which he paid at maturity, and for the balance of said purchase-money of said bonds, to wit, forty-four thousand dollars.

Your orator gave his note to said Mordecai, payable to said Cutts and endorsed by him, to be used and taken by said Mordecai; and your orator here expressly charges that he was not interested in the consideration of said note, but was, in truth and in fact, only security for said

Cutts; that he was ignorant of the forms of commercial paper, and trusted and believed that, in law and equity, he was only becoming security for said Cutts, and not charging himself as the original promissor in said transaction. And your orator further charges that, to secure the said note, he gave to said Mordecai, of that date, his mortgage-deeds to various town-lots and buildings in the city of Americus, which said mortgage is not in his possession, but in the possession of said Mordecai, and your orator cannot attach a copy hereto, but which forms a part of the proceedings in the rule nisi of said Mordecai hereafter referred to.

And your orator further charges that in the year 1866 the said Cutts paid to the said Mordecai, on the said note, fifteen thousand three
70 hundred and twenty-five dollars in certain property agreed by him and said Mordecai at that time to be worth in United States currency that amount, and which was, in fact, then worth that amount.

And your orator further showeth that at the November term, 1866, of the superior court of said county of Sumter, the said Mordecai filed his petition for a rule nisi to foreclose said mortgage against your orator and said property, and brought his action against your orator said Cutts on said note, and procured the granting of said rule, requiring your orator to show cause at the April term, 1867, why said mortgage should not be foreclosed. That at the said April adjourned term your orator shewed, for cause, the said note was a confederate transaction, payable in fact in confederate money, and subject to be scaled under the ordinance of the constitution of the State of Georgia, held in November, 1865, that an issue was made upon said cause shown and submitted to a jury, and that the jury returned a verdict in favor of your orator upon the proof rendered, that said note, though upon its face payable in money, was in fact intended by the parties to be paid in confederate currency, and upon the additional proof that fifteen thousand dollars had since the war been paid on the same in legal currency. That the said
71 Mordecai filed his bill of exceptions and carried the said cause before the supreme court of the State of Georgia, and that said court, at its July term, granted a new trial on the ground of misdirection of the judge to the jury; all of which proceedings on said rule nisi are of file in the clerk's office of the superior court of said county, and your orator prays a leave of reference thereto as may be convenient, with the costs and trouble of attaching a copy hereto.

And your orator further sheweth that he has lately discovered that the said Benjamin Mordecai is indebted to said Allen S. Cutts fifteen thousand for usurious interest paid the said Mordecai by said Cutts in the years 1858 & 1859. That he is informed and believes, and so charges, that the said Cutts paid to said Mordecai in the year 1858, five thousand dollars at one time purely usurious and for forbearance of certain debts then due to said Mordecai by said Cutts; that this was over and above all legal and usual charges on said debts for interest and commissions and was not entered or used as a credit on said debts; and your orator further charges that he is informed and believes and so charges that in the year 1859 the said Cutts paid to the said Mordecai ten thousand dollars at one time of purely usurious interest for forbearance
72 of the same and other debts due by said Cutts to said Mordecai; that this was all over and above all legal interest and commission on said debts, was not used or entered as a credit on the same or any of them.

And your orator further charges that said Cutts, by the loss of his negro property by emancipation, in and by the depreciation of his lands, growing out of the disturbed condition of the country, is unable to pay

the said note in full; he will not be able to recover any portion thereof from said Cutts, against whom there are now pending large suits, and the same will be a total loss to your orator, as he has no security except the honor of said Cutts.

And your orator further shows that said Cutts has consented to transfer to your orator his claim against said Mordecai; and your orator designed and intended to file an additional plea in said rule nisi, setting up said claim, so soon as the judgment of the supreme court was made the judgment of the superior court, and a new trial ordered. And your orator further shows that the October term, 1867, on the second day of the said superior court, and before the judgment of the supreme court was made the judgment of the superior court, or, at any rate, before your orator, or, as he believes, his attornies were notified thereof, the said Mordecai, by his attorneys, moved to dismiss their rule nisi to foreclose said mortgage and said suit on said note, with the avowed
73 intent on his part to renew said suit in the district court of the United States, and to seek the foreclosure of said mortgage in said district court.

And your orator charges that said Mordecai is not a resident of this State, and has no property, so far as this defendant knows or believes, in this State, out of which the said usurious interest*ed* could be collected.

And your orator further shows that he is old and infirm, and if this large claim is fixed against him——

[NOTE.—This disconnection appears in the original bill.—*Clerk.*]

poor; that said Mordecai has elected the form of the superior courts of the State of Georgia to adjudicate his rights and decide the matter in issue between them; that the case has now progressed in said superior court until it s ripe for trial before a jury; that your orator is ready to file his plea as to said claim of Cutts vs. said Mordecai; and that it is grossly vexatious and unjust, and calculated without any reason to run your orator to large additional expense and suspense in defending said proceedings in another court; that your orator has been at great trouble, has employed attorneys, and taken other and legal steps to prepare his defense in said superior court, and if the said Mordecai is permitted to dismiss his suit, with the power and intent to renew the same in
74 said district court, all his said preparations and attorneys' fees and other preparations will be lost, and your orator be compelled to make new preparations, employ new attorneys.

And your orator here now expressly charges that there is no legitimate proper reason why the courts of this State should not retain the jurisdiction of said cause. That the contract was made in the State of Georgia. That said Mordecai has elected to seek his remedy in the courts of said State, with a full knowledge on his part of all the facts of this case, and of his rights and of the laws of the State of Georgia and the ordinance of said State bearing thereon. That your orator has a legitimate defense to said suit and rule nisi, and he claims that he has a right to have the same tried in the *former* chosen, and not thus vexatiously and causelessly dragged from *former* to former (?) at great expense, and much to his harrassment and trouble; hoped that the said Mordecai would have been willing to have the issue tried fairly before a jury of the courts of this State. But now so it is, may it please your honor, he insists and claims and threatens that he will dismiss said suit and rule nisi. Forasmuch as the same is unjust, and unequitable, and calculated grossly to harrass and vex your orator, and forasmuch as

your orator has no remedy at law, but only in equity, your orator
75 prays that your honor may grant to your orator the State's writ of injunction, to be directed to said Mordecai, his agents and attorneys, enjoining him and them from dismissing the suit and rule nisi in said cause. And your orator further sheweth unto your honor, that at the date of said note confederate money was not worth more than three dollars for one in the constitutional currency of the country, and at the maturity of the same the said money was not worth more than from ten to fifteen dollars for one of the said constitutional currency. That, on the basis of the date of the said note, the said note was not worth more than fifteen thousand dollars, and far less on the basis of the value of said currency at the maturity of said note; and your orator charges that after taking off the payment credited on said note and applying to the same the just and legal claim of said Cutts against said Mordecai for the said illegal and usurious interest paid said Mordecai by him, as your orator has set forth, the said note and mortgage is entirely paid off and discharged and ought to be delivered up to be cancelled, or, if not wholly paid off, so reduced in amount as to be in truth an insignificant demand. And your orator charges that while it is true that said Mordecai threatens, should be permitted to dismiss said rule nisi, to
76 institute proceedings in the said district court, yet your orator does not know this to be so, but it may be that said Mordecai intends to keep still and delay any proceedings until the statute of limitations will bar proceedings as to said usury, and until the witnesses hath of the consideration of said note, the relation of your orator thereto as only security, and all the facts and circumstances as to the note and usury aforesaid shall be forgotten or impossible to be proven, keeping the said mortgage, which is a sealed instrument, open against your orator.

And your orator charges that the said mortgage in law and equity paid off and discharged, and for the reason he has set forth ought to be cancelled, and that it is unjust and unequitable that it should remain open as a cloud upon the title of your orator to said property, and an incumbrance thereon, hindering its sale and seriously interfering with its practical value to your orator; that your orator is old and infirm, and is desirous of settling his affairs and preparing for what he feels must, in the course of nature, soon happen—his death; and it is grossly repugnant to his feelings and his sense of right to have his estate beclouded and hampered with said mortgage, when, as he believes, it in justice ought to be declared satisfied and delivered up to be cancelled now, while he is in life, and the witness' to the facts are living, and their memory fresh as to the truth of the case. And your orator well hoped——

77 And your orator, further complaining, sheweth unto your honors that he is informed by the said Allen S. Cutts, and he is fully satisfied of the fact, that, during the years 1857, 1858, 1859, & 1860, at various times and on various claims, the date and amounts of which your orator does not know, and cannot, without a resort to the conscience of the said Cutts and Mordecai, discover, the said Cutts paid to the said Mordecai other large sums of money as usurious interest for the loan and forbearance of money and debts due, amounting, as your orator is informed and believes, to the sum of ten thousand dollars, or about that sum. And your orator charges that, in consequence of the insolvency of said Cutts, which he here now charges, he will be utterly unable to collect from him any amount the said Mordecai may recover on said note and mortgage; and it is grossly unequitable to permit the said Mordecai to recover and collect the said note, or any part thereof,

out of your orator, who is a mere security of said Cutts, as the said Mordecai well knows.

And your orator charges that, by reason of the strict rule of the common law, he is unable to set up said defense at law, first, because of the same not being a mutual debt, and, second, because he cannot set forth and prove, without a discovery from said Cutts and Mordecai, the sums upon which said usury was paid, the times when
78 the contracts upon which said usury was paid were made, nor does he know the precise amount of usury agreed upon, taken, or reserved on said various contracts.

And, by way of future amendment, your orator further prays that the said Cutts and the said Mordecai may be compelled, upon their several corporal oaths, to answer the premises, and especially that they do each of them answer in detail the several amounts of usury paid by said Cutts to said Mordecai, and the times they were paid, the particular debt usury was paid upon, and how much & the rate per cent. on each debt, and the amount of each debt, and the time it was made and payable; whether the said Cutts is not insolvent, and your orator only in fact security for said Cutts, and not interested in the consideration.

And your orator may, by a decree of your honorable court, compel the said Cutts to agree and consent, and the said Mordecai take and account for, upon said notes, each of said several sums of usury so paid by said Cutts to said Mordecai as a set-off on said note, after all other equitable and fair set-offs and deficiencies, payments and deductions, are considered. And your orator will ever pray, &c.

W. A. HAWKINS,
H. K. McCAY,
Sols. pro Compt.

79 GEORGIA, *Sumter County:*

You, James Stewart, do swear the facts and statements set forth and made in the foregoing amendment are true, so far as they depend or are stated as in your own knowledge, or of your own act, and so far as they depend or are stated as in the knowledge or on the act of others you believe them to be true.

JAMES STEWART.

Sworn to and subscribed before me this 25th Oct., 1867.
WM. H. BREWER, *J. P.*

And compel him to proceed to the speedy trial of the same.

Or should your honor deem it more consonant with the principles of right and equity, that your honor may enjoin him from either dismissing or bringing said proceedings at law, and compel him by a decree of your honorable court to deliver up said note and mortgage-deed to be cancelled and said suits at law entered settled. And that your honor may grant the State's writ of subpœna requiring said Mordecai and the said Cutts to be at the next superior court of said county to answer the premises, and that your honor may grant to your orator such other and further relief as to your honor may seem meet; and your orator will ever pray. And your orator expressly the answer of said parties.

W. A. HAWKINS,
H. K. McCAY,
Complt. Sol.

80 GEORGIA, *Sumter County:*

You, James Stewart, do swear that the facts and statements made and set *set* forth in the foregoing bill are true so far as they depend

on your own knowledge, act, and deed, and so far as they depend upon the knowledge, act, and deeds of others you believe them to be true.

JAMES STEWART.

Sworn to and subscribed before me this 15th Oct., 1867.

JAS. A. ANSLEY,
Judge S. S. C.

GEORGIA, *Sumter County:*

Read and sanctioned, and the said defendant is required to show cause before me, at Americus, during the present term of the superior court of said county, when the case can be heard, why the injunction prayed for should not be granted, and in the mean time be enjoined under the penalty of five thousand dollars to take no further action on the motion to dismiss or withdraw said rule nisi and suits until a hearing of this application is had.

Oct. 15th, 1867.

D. A. VASON,
J. S. C., S. W. C.

IN CHAMBERS, *Nov. 5th*, 1867.

The hearing on this bill having been adjourned from Americus to Albany, and the defendant having by his counsel appeared as required to show cause why the injunction should not be granted, and
81 having shown sufficient cause, it is, after argument had, ordered that the injunction issue as prayed for in the penalty ten thousand dollars, enjoining the said Mordecai from dismissing said rule nisi and said suit against Stewart and Cutts, and other and usual proceedings be had as is the practice in equity.

D. A. VASON,
J. S. C., S. W. C.

Sumter superior court, April term, 1868. James Stewart vs. Benjamin Mordecai. Bill for his relief. Original filed October 16th, 1867. A. G. Ronaldson, clerk.

GEORGIA, *Sumter County, ss:*

Be it remembered at the October term, 1866, of Sumter superior court, to wit, December adjourned term of said October term, 1866, the case of Benjamin Mordecai against Jas. Stewart, being an application on rule nisi to foreclose a mortgage on certain real estate situated in Americus, Sumter County, was called for trial at said December adjourned term, on the 19th day of said month of December, honorable David A. Vason, the judge presiding at said adjourned term, and when said cause was announced on the docket James J. Scarborough, one plaintiff's counsel, stated that he was not ready for trial and that he desired a continuance, stating that the case had been called at the regular
82 term before Judge Spear; that he, as plaintiff's counsel, not knowing at the time of any defense, took a rule absolute foreclosing the mortgage, and that Judge Spear then struck the case from the docket; that after that, and during the regular term, H. K. McCay, esq., an attorney for the court, announced that W. A. Hawkins, who had leave of absence, had been employed as attorney, for the defense; whereupon plaintiff's attorney, at said regular term, withdrew the order of the court foreclosing the mortgage before the same had been spread upon the minutes; that when said cause was called before his honor Judge Vason, plaintiff's attorney stated that he had not been notified that there was

any defense to said case and had not prepared his case for trial, as he had considered the case had been continued for the term; that the plaintiff lived in Charleston, and that said counsel were not ready for the trial in consequence of the fact that his client lived out of the State and he needed his presence at the trial. The court refused to continue the case, and plaintiff's counsel excepted and assigned the same as error. A jury was empannelled to try the cause upon the sole sworn plea of defendant, and which will appear in the transcript of the record. The plaintiff then read in evidence of (?) the jury the rule nisi to foreclose the mortgage, which was then personally and duly served on the de-
83 fendant, then a promissory note or single bill under seal, dated 8th day of January, 1863, made by defendant, payable to order of A. S. Cutts, twelve months after its date, with interest from its date, for forty-four thousand dollars, and endorsed by A. S. Cutts to the plaintiff, said note having indorsed upon it on 17th March, 1866, a credit of fifteen thousand three hundred and twenty-five dollars. Plaintiff then read in evidence a mortgage having even date with said note and reciting said note to secure the payment thereof, which mortgage is in the usual form; and here plaintiff rested. The defendant then read in evidence, to which plaintiff's counsel objected, the court overruling their objections, the signature of said letter having been admitted in plaintiff's genuine handwriting, a letter from plaintiff to A. S. Cutts, of which the following is a copy:

"BANK OF THE STATE OF SOUTH CAROLINA,
"*Columbia, December 19th*, 1862.

"A. S. CUTTS, Esq.,
"*Americus, Georgia:*

"DEAR SIR: Your favor 15th inst. received. I will accept the proposition made me, viz, that Mr. Stewart will give me a mortgage upon the property proposed, provided it is worth the amount he proposes to secure me for, and that it is covered by insurance and said policy assigned. Should I have occasion to sell property to re-imburse my-
84 self and it falls short the amount of his indebtedness, I shall of course expect to hold him for the balance. I understand this to be his proposition. The balance of fifty thousand dollars, I shall be willing to take the title of the Ga. & Penn. R. R. Co. for fifty thousand acres of land as stated in your letter. This I understand to be your meaning, which gives me pleasure to comply. With this understanding, I will be with you the first week in January next. I cannot be with you before. If in the mean time you make sales of any of the land you can account to me when I see you. When I leave here I will deposit the bonds with the So. Western Railroad Banks, subject to my orders in favor of Houstoun, pt. Write me if this is our understanding.

"Your obedient servant,

"B. MORDECAI."

The defendant then offered as a witness Allen S. Cutts, who was the alleged mentioned deft., to whose competency plft.' counsel objected. Defendant deposited cost, and the court allowed him to testify, not as a party, but upon a release of and depositing the cost; who testified that the $44,000 note and mortgage was given for Georgia and Pensacola Railroad bonds, and identified a bill of particulars or sale, dated January 6th, 1863, of items of plaintiff's against said Cutts, amounting, aggregately, to $106,679.19c., and that the note was given for bonds of the Ga. & Pensacola R. R. Co., which were selling in confederate
85 money at 80 cents on the dollar. These bonds had been previ-

ously sold by witness to Mordecai, at 70 cents on the dollar, before the war, and witness had been paid for them by Mordecai at this rate. By getting these bonds from Mordecai witness obtained possession of fifty thousand acres of Florida land, then and now worth $2.50 per acre; though witness insists that he had a legal claim to these lands, and, as he believes, could have compelled the company to give him possession of them, if he had had time to do so. The ruling rate of market-value of these bonds at the time the note was given was 80 cents on the dollar in confederate money. A payment was made—$15,325.00 in Florida lands, at $2.50 per acre, about the value of said lands. Twelve thousand six hundred and nineteen acres of said lands being, at said rate, partly paid on some other claims of Mordecai. The transaction was a confederate one, made at the time it purports to be on the bill of particulars; $12,000 and odd dollars were paid in confederate money, the $50,000 was soon thereafter paid in confederate money, as is stated in the bill of particulars. The land before the war was worth $2.50 per acre, in good money; the land was no part of this purchase. He bought the bonds to avoid litigation with the railroad company about the lands, as he was in the war, and embarrassed at home, and could not attend to a settlement with the railroad company. The other claims of
86 plaintiff's, on which a payment was made at the time, credit of the note, was not connected with his claim. Fifteen thousand three hundred and twenty-five dollars' worth of said Florida lands were paid on this note. These were the lands the possession of which was obtained as above stated. The reason why witness did not before make any resistance to the payment of this debt, and the other debts in which he claimed there was usury, when he was in the army and embarrassed at home, and would have done anything not involving principle to save Mr. Stewart, his friend, and to prevent litigation, the consideration for which the note and mortgage was given, as before stated, was Ga. & Pensacola Railroad bonds.

The defendant then read in evidence, over and against plaintiff's counsel objection, the following paper, the original having been identified, and proved to be said bill of particulars on sale, viz:

Col. A. S. Cutts bought of B. Mordecai:

1863, January 6th.—To 220 G. & Pensacola 2.20 R.R. bonds, $5 each, at 80 c	88,000	00
To 220 coupons, payable 1st July, 1861, $20.00	4,400	00
To interest on the same to 6th Jan'y, 1863	357	06
To 220 coupons, payable 1st July, 1.62, each 120	4,400	00
To interest on same, 6 July, 1863	181	86
To 220 coupons, payable 1st July, 1863, each $20.00	4,400	00
Interest to 6th Jan'y, 1863	587	00
	106,679	19
Deduct cash	12,679	19
	94,000	00
Mortgage	44,000	00
	50,000	00

87 Here def't closed.

Plaintiff then introduced, in rebuttal, Charles W. Charlton, who testified, in September last he purchased from defendant hotel-lot and building covered by said mortgage; that Stewart refused to sell or agree to sell until Col. Cutts had agreed to advance $7,000 to Stewart in place of $7,000 to be paid to Mordecai to release the mortgage on said property, (hotel-lot;) the parties, Charlton, Stewart, and Cutts requested C. T. Goode, esq., attorney for Mordecai, to write and get authority to release the mortgage on said hotel on payment of $7,000 and a mortgage 1,000 acres of Missouri land, its estimate' market-value, which was done; the parties calculated with Col. Goode the market-value of the other property embraced in the mortgage, and all the parties came to the satisfactory conclusion that there would be just about enough property to pay the amount of the mortgage.

Col. Cutts agreed to re-imburse Stewart for $7,000 purchased money, which was to go to Mordecai in case he would not make arrangements with Mordecai, but the extent of the understanding on the part of Cutts was, namely, to release the property from the incumbrance of the property in some way. Plff. then after identified the agreement of Charlton. Last witness read in evidence the original, of which the following is a copy:

GEORGIA, *Sumter County:*

88 Be it remembered that it is hereby agreed and covenanted between James Stewart and Charles W. Charlton, both of said county and State, that the said Charles W. Charlton is to pay to said James Stewart the sum of seven thousand *thousand* dollars on the first day of January next, if practicable for him to do so, and at all events by the first day of March next, and also to convey to said James Stewart good and sufficient titles to one thousand acres of land in the county of Durkie, in the State of Missouri, near the county-site Kenneth, and the same James Stewart, in consideration of the payment of said sum of money as aforesaid, and the conveyance of said land as aforesaid, hereby obligates himself to make good and sufficient title to said Charles W. Charlton, conveyed to him free and unincumbered, the town property known as Stewart's hotel, now occupied by W. D. Stewart, together with the lot upon which the said hotel is constructed. Said titles do cover both the lot and the building thereon. It is understood between the contracting parties that in case the hotel-building should be injured or destroyed by fire before Charles W. Charlton receives possession, which he is to have by the first day of January next, then so much of this instrument as relates to the conveyance of hotel-buildings and said Missouri lands to be void, it being the intention of the parties that the Missouri land shall pay for the hotel-building.

JAMES STEWART, [L. S.]
Per W. D. STEWART.
C. W. CHARLTON. [L. S.]

Signed, sealed, & delivered in the presence of—
ALEXANDER KING.
F. M. COKER,
Not. Pub.

89 The plaintiff read in evidence the foregoing agreement upon the back of the above agreement, in accordance with instructions from Mr. Benjamin Mordecai, who holds a mortgage up' the hotel lot and building within described. We hereby, as his attorneys, agree to

relieve the mortgage upon the payment to us of seven thousand dollars between the first of January and first of March next, and a receipt of a mortgage upon the (1,000) one thousand acres of Missouri land this 20th September, 1866.

SCARBOROUGH & GOODE,
Attys. for B. Mordecai.

Plaintiff then introduced Matthew R. Stamell, who testified that in December, 1862, or January, 1863, corn was selling in confederate money from one dollar to one dollar and a half per bushel, and bacon from 18 to 22 cents per pound, less than the present price in greenbacks. Witness bought and sold these articles at that time. The rate for gold was three for one, and merchandize was higher than gold. In 1864 gold was 20 for one, corn 7.00 per bushel, and meal $3.00 per pound.

Plaintiff then introduced William D. Stewart, who testified that at the October term, 1866, James J. Scarborough, one of plaintiff's attorneys, had witness called, who was agent of his father, the deft., and said Scarborough asked him if he or his father had any objection to making the rule nisi absolute, and witness told him, Scarborough,
90 neither he nor his father had any defense that he knew of. He had a conversation with plaintiff in 1866, and plaintiff said the note and mortgage was given for a confederate consideration for the $88,000 bonds, rated at 80 cents, confederate money, on the dollar.

James J. Scarborough was then introduced for plaintiff, who testified that at the time (17 March, 1866) of the payment of the $15,325.90 on said note Col. Cutts sold to plaintiff 12,000 acres of Florida lands, in the counties of Columbia and Suwannee, as he believes in those counties, at $2.50 per acre, and a bond or inchoate (?) deed was taken from Cutts to plaintiff; that no number of township or range was mentioned therein; that Cutts had a plat of the lands, with some that had been sold marked upon it; that plaintiff was to have his choice of the unsold land, and to send an agent to examine them within two months, and this Cutts was to execute a good deed description of the land; that plaintiff or this agent had not, within his knowledge, made selection, and that he had no doubt if he had done so Cutts would have executed the proper deed, and that the amount of the lands by Cutts to (Mordecai) plaintiff was $30,000, a portion of which was applied to other claim against Cutts, and $15,325.00 applied as a credit or partial payment on the note secured on the mortgage.

Here all the evidence ceased.

Plaintiff's counsel, after argument, had requested his honor
91 David A. Vason, the judge presiding, to give charges to the jury the seven *foregoing* written requests, viz:

1st. That the ordinance by the convention upon which the defendant relies is a violation of the constitution; that the legislature, and not the convention, is the law-making power, and that said convention had no right to pass any such ordinance.

2d. That if the court be of opinion said ordinance is binding and operative, yet, if the jury believe Col. Cutts, that the note and mortgage were given for Geo. & Pensacola R. R. bonds, which he bought of Mordecai, to which he obtained titles to near or about 100,000 acres of Florida lands, worth $2.50 per acre, then and in that case the note and mortgage are not intended to be included within the ordinance.

3d. That if the jury believe the note and mortgage were given for Ga.

& Pensacola Railroad bonds which were of value to Col. Cutts, the consideration is a valid one, the sum not looking closely to the quantum of the con deration, so that it is lawful and of value to defendant.

4th. That it is incumbent on the defendant to show by proof, even under the ordinance, that sort of currency the note and mortgage were to be paid in; that if he has failed to do so, the sum. presumes the payment was to be paid in a legal, constitutional currency, and that the defendant must be held down to his sw'rn plea; and if has failed to show what kind of currency the note was to be paid in; the
92 jury ought to find the full amount due, deducting the credit of $15,325.00. That the value of confederate money under the proof of this case to do with the question before them.

6th. That there is no want or failure of consideration pleaded, and defendant must abide by his plea or answer.

7th. That in relation to the payment on the note of $15,325.00, it is an executed partial payment, and must be held for payment for that amount only, and no part of it can be carried over or against the balance due on the note, unless there was an agreement it should be accepted in full payment, and, further, the said payment in evidence of a good, valid, and subsisting debt.

At the time it was made the court refused to *in* charge *to* the jury as requested, 1st, 2d, 3d, 4th, 5th, 6th, & 7th requests, and in lieu thereof read to the jury the following charge, which he had prepared, viz: "The dft. set up that the mortgage debt has been paid or discharged, and to show this he set up that this is an unexecuted contract made during the late war, and is subject to be sealed according to provisions of that act of the convention of the State of Georgia. If you are satisfied from the evidence that the intention of the parties were that this debt was to be paid in the currency then in circulation, then you have the right to scale this debt, and fix the amount in our currency at this time of the debt. The rule to be adopted by you
93 in fixing this amount under said ordinance depends upon the view you may take of the facts of the case. If you believe it was the intention of the parties that plaintiff took the risk of the rise or fall in the value of confederate money from the making to the maturity of the note, then you ought to execute the contract as near as you can. As the contract matured 1st January, 1864, if defendant had tendered the lawful money at that time, and pltff. had refused to receive it, this would have been a discharge of defendant; but as it is not pretended here that there was a tender, then the plaintiff is entitled to so much in the present currency as is equal to the value of the amount in confederate money at that time. To find out the value of confederate money at that or any other time, you may either take the broker's rate of gold in confederate money, with the discount or depreciation of any paper currency added thereto, or you may take any other standard furnished to you by the evidence in this case for this purpose. I have allowed testimony to go before the jury proving the value of corn and other property. You can, if you please, deduce the value of the currency at that time from this source; but should you believe that this result would not be equitable and just to either party, according to the facts of this case, then you may take the balance of confederate money at the time of the making of this note, to be ascertained as above
94 explained. Besides this, you may, if it does not violate the terms of the contract as agreed upon, as before stated, take into consideration the value of the consideration received by Col. Cutts from plaintiff for the note and adjust the equities of the parties by this

method; but you ought to discard this if you believe the true agreement of the parties was that Cutts was to pay the note in confederate treasury notes. As to the credit entered on the note since the war, you will find out, if you can, what was the agreement of the parties in relation to the same, and carry it out. If you are not satisfied from the evidence as to the intentions of the parties, then you will find out from the evidence how this payment was made, and charge the plaintiff with the value of the same in our present currency;" which refusal to charge as requested and charge so given in sum. thereof plff. then excepted, and now here excepts and assigns the same as error. The court was also requested by Mr. Goode, one of plaintiff's counsel, verbally to charge the jury that if the bonds, the consideration of the note sued on, were worth at the time the note was given as much as the face of the note calls for in greenbacks, the jury should find for the plff.; and that if the bonds at the time the note was given as much as the jury should find for the plaintiff, and that if the bonds at the time of the sale,
95 when the note in (?) as given would have been sold for $44,000 in confederate money, and Cutts with that confederate money would have purchase' more of the usual commodities of commercial traffic than plaintiff can now do with greenbacks, that the verdict of the jury should be for their claim by the plaintiff; which the court refused, and plaintiff excepted and assigned the same as error. The jury, after argument had, found a general verdict for defendant, and the court allowed defendant' counsel to take an order instanter to have the note and mortgage filed in the court satisfied; to which plaintiff excepted.

And after said verdict and pending of the jury for defendant, at the said December adjourned term, 1866, plaintiff's counsel made out, and had agreed upon and consented by defendant's counsel, and approved by the court then in session, and filed the same in that clerk's office, a brief of evidence in said case, and took the following order, approved and signed by the judge, viz: Benjamin Mordecai vs. James Stewart. Application to foreclose mortgage on real estate. Verdict for defendant, and motion for new trial. The brief of evidence having been agreed upon by plaintiff's and defendant's counsel and approved by the court and a motion for a new trial filed,

It is, on motion of counsel, ordered that defendant's counsel
96 show cause at Lee superior court, 4th Monday in January next, why a rule nisi should not be granted in said cause, and that the presiding judge have leave to perfect the grounds of error alleged, and that the plaintiff be allowed until then to perfect their grounds for new trial.

(Signed) D. A. VASON,
J. S. C., S. W. C.

Which motion for new trial Scarborough & Goode, plaintiff's attorneys after the case, filed in the clerk's office a dismissal of, as follows:

We, Scarborough & Goode, hereby dismiss the above and within motion for new trial, and pray it may be entered on the minutes of Sumter superior court.

January 18th, 1867.

SCARBOROUGH & GOODE,
Plaintiff's Attorneys.

Which filing of said dismissal appears from a certified copy at the clerk's office and at Lee court, 4th Monday January, 1867. After said

dismissal so filed in Sumter superior court, the court, honorable D. A. Vason, allowed and permitted defendant's counsel to take the following order, a bill of exceptions having been in his office on 19th January, 1867, one day after the dismissal as aforesaid, which orders is as follows: After stating the case as before dismissed, the plff. having withdrawn his application for new [trial] (?) in this case, it is ordered that the same be allowed and that the defendant recover from the plaintiff the sum of dollars for his cost, and that the clerk of on the minutes of the court.

97 Stauperville, Ga., July 25th, 1867.
(Signed) D. A. VASON,
J. S. C., S. W. C.

And, as the same does not appear of record, now comes the plaintiff, Benjamin Mordecai, by Scarborough & Goode, his attorneys, and excepts to the charge of the court, and of rulings of the court, and refusal to charge, as is before set forth, and prays that this bill of exceptions may be signed and certified pursuant to the standard in such cases made and promised this 15th day of January, 1867.

SCARBOROUGH & GOODE,
Attys. for Plaintiff in Error.

GEORGIA, *Sumter County:*

I do hereby certify that the foregoing bill of exceptions is true, and contains all the material evidence to a clear understanding of the errors complained of; and the clerk of the superior court of Sumter County is hereby required and ordered to make out a complete copy of the record in said case, and certify the same as such, and cause the same to be transmitted to the term of the at Milledgeville, that the errors complained of may be corrected, if errors.

It is but proper to say that the defendant's counsel protest to my certifying this bill, upon the ground, 1st, that it is too late; 2nd, that the plaintiff at the time of the filing of this bill had an application for a new trial pending in said case. I have overruled or disregarded
98 their application, 1st, because the bill of exceptions was at my office on the 19th January, at which time I was on the circuit; 2nd, because the plaintiff's counsel, when the bill of exceptions was tendered, signified their wish to dismiss their application for a new trial, which was allowed by the court and an order taken at Lee superior court, to which place the same was referred by agreement of the parties for trial. I have therefore felt it my duty to certify the bill of exceptions.

Given under my hand and official signature this 30th January, 1867.

D. A. VASON,
J. S. C., S. W. C.

GEORGIA, *Sumter County:*

Be it remembered that on the 15th day of October, 1867, at and during the regular term of the superior court of said county, his honor, David A. Vason, one of the judges of the superior courts of said State, presiding, the causes of Benjamin Mordecai vs. James Stewart & Allen S. Cutts, which was an action of complaint on a note, and of the same plaintiff vs. James Stewart, which was a rule nisi to foreclose a mortgage given to secure the payment of said promissory note, then and there pending, the said Benjamin Mordecai, through his counsel, having on the previous day filed the remitter from the supreme court, granting a new trial in the case of said Mordecai vs. said Stewart on said rule

nisi, and the same having been entered of record, and made the
99 judgment of said superior court, moved to dismiss the said common-law action and the said rule nisi, the said Mordecai being then and there present in court. Whereupon, after some consultation between counsel and on both sides, the said motion was postponed until the next day, when, being called up by the counsel for said Mordecai, the said motion to dismiss was refused by the court upon the ground that a bill by the said Stewart vs. the said Mordecai for injunction and relief had been presented to him, upon which he had passed the following order:

GEORGIA, *Sumter County:*

Read and sanctioned, and defendant is required to show cause before me, at Americus, during the present term of the superior court of said county, when the case can be heard, why the injunction prayed for should not be granted, and in the mean time he be enjoined, under the penalty of five thousand dollars, to take no further action on the motion to dismiss or withdraw said rule nisi and suit until a hearing of this application is had.

Oct. 13th, 1867.

D. A. VASON,
J. S. C., S. W. C.

The hearing upon this order having been postponed until Friday, the 25th of October, 1867, at chambers at Albany, parties appeared by counsel and argued the same before the said David A. Vason, judge as aforesaid, who postponed his decision thereon until the session of
100 Lee superior court, when the following additional order was passed by his honor:

IN CHAMBERS, *Nov. 5th*, 1867.

The hearing on the bill having been adjourned from Americus to Albany, and the defendant having by his counsel appeared to show cause why the injunction should not be granted, and having shown no sufficient cause, it is, after argument, ordered that the injunction issue as prayed for, in the penalty of ten thousand dollars, enjoining the said Mordecai from dismissing said rule nisi and said suit against said Stewart and Cutts, and other and usual proceedings be had as is the practice in equity.

D. A. VASON,
J. S. C., S. W. C.

His honor having, before making the said order, delivered an opinion, the substance of which was reduced to writing by him, and handed by him to counsel for defendant in a memorandum, of which the following is a copy:

JAMES STEWART *vs.* MORDECAI. } Points decided by D. A. Vason, J. S. C., S. W. C., upon the application for injunction in the case.

1st. The bill shows that the mortgage-debt has been paid. This is much weakened by considering as a part of the bill the facts stated in the bill of exceptions. Yet if this debt was a confederate debt, or intended by the parties to be payable in that currency, as charged,
101 and since the surrender the payment of $15,000 was paid by Cutts on this debt in the present currency, this is prima facie a payment of the debt.

2nd. If the debt has been paid, then Mordecai has no right to hold the mortgage and debt open, and a court of equity has jurisdiction to require it to be delivered up and cancelled.

3rd. It is true this application for injunction is made after Mordecai's counsel has made application for leave to dismiss his common-law suit on the note and his petition to foreclose his mortgage, and at the time of making the application Mordecai was present in the court and in the county, though he left before the filing of this bill; yet at any time, during the pendency of the suit, a court of equity can take jurisdiction of the whole subject-matter in litigation between the parties upon a proper case made.

4th. This bill has equity in it for a purpose of a discovery as to the usurious transaction sought to be applied as a set-off to any portion of the debt not paid off. The bill shows that complainant could not file the plea of usury at law for want of such information as would enable him to comply with the rule prescribed. There is nothing in the objection that there is no privity between Stewart and Mordecai as to the usurious transaction. Stewart, as the security for Cutts, can set off any debt due to his principal by Mordecai.

102 5th. The statute of limitations does not come up before me in this case as a bar to the complainant's rights to a discovery. It is much safer to leave that matter subject to the right of the defendant to be insisted upon hereafter. A paper purporting to be a plea set-off for usury was filed by the said James Stewart, defendant, in the common-law suit and rule nisi before referred to at the regular session of Sumter superior court, on the 16th day of October, 1867, & on the 25th day of Oct., 1867, at the hearing at chambers, Albany, before referred to, said Stewart amended his said bill so as to make Allen S. Cutts a party-defendant thereto, and prayed discovery from the said Cutts and the said Mordecai, and varying the charges of usurious transactions between the said Cutts and the said Mordecai, as made in the said plea of set-off for usury and the original bill, which said plea and amendment appear in extenso in the transcript of the record in the case. Before making the last-recited order upon said bill at chambers, during the session of Lee superior court, his honor Judge Vason ordered certain portions of said bill charging that the district court of the United States for the district of Georgia, if said common-law suit and rule nisi were dismissed in Sumter superior court, and renewed in said district court, would decide the law of said causes wrong, to be stricken as scandalous, which was done. His honor having also suggested, in delivering the opinion before referred to, that the case of complainant in said bill was much weakened by the bill of exceptions and judg-

103 ment of the superior court therein in the case of B. Mordecai vs. complainant, which complainant has made a part of his bill, by the usual and proper references to them as of file in Sumter superior court, counsel for complainant, after his decision had been pronounced, moved to amend said bill by striking from it everything which made said bill of exceptions, judgment and a part of said bill, which motion was opposed by counsel for defendant Mordecai, and refused by the court. To the refusal of the court to dismiss the common-law suit and rule nisi, and to the first order upon said bill made on the 13th day of October, 1867, as before recited, counsel for Mordecai then and there excepted.

To the second order upon said bill, made on the 5th day of November, 1867, as before recited, counsel for Mordecai then and there excepted, and now except, to both of said judgment of said court, and assigned the same as error. And counsel for defendant Mordecai, on this the

9th day of November, 1867, being within thirty days from the decision of said court above referred to, tendered his bill of exceptions, and says that the court erred—

1st. In passing the order above recited of the 15th Oct., 1867.

2. In holding that there was equity in said bill.

3d. In passing the order above recited of the 5th Nov., 1867.

4th. In holding that said bill shows that the mortgage-debt has been paid by the $15,000 in the present currency, credited thereon, notwithstanding the decision of the supreme court in reference to that credit.

5th. In denying to Mordecai his plain-stated right to dismiss his common-law suit and rule nisi.

104 6th. In holding this plain-stated right of Mordecai to dismiss must be denied him in order to afford Stewart a complete remedy when the said Mordecai was present in the court and county at the time of the making of the application to dismiss, and could have been then and there personally served with any process at law or in equity without interfering with the right of said Mordecai to dismiss his said actions.

7th. In holding, in effect, that the mortgage of said Mordecai, under the facts set forth in said bill, is a cloud upon the title of Stewart, and should be delivered up and cancelled, together with the note which was secured by it.

8th. In holding that there is equity in the bill for the purpose of discovery.

9th. In holding that the statute of limitations did not bar the complainant's charge of usury.

10th. In granting the extraordinary remedy of injunction, so as to interfere with and deny a plain statutory right upon a bill the charges of which are not clear, explicit, and unequivocal, but, on the contrary, vague, uncertain, contradictory, hypothetically averred, and hypothetically sworn to.

And, as the facts aforesaid do not all of them appear of record, the defendant Mordecai, by his counsel, prays that this bill of exceptions may be signed and certified, as required by the statute in such case made and provided.

COBB & JACKSON, NISBETS,
Deft.'s Sols.

105 I do certify that the following bill of exceptions is true and contains all the evidence material to a clear understanding of the errors complained of, and the clerk of the superior court of the county of Sumter is hereby required and ordered to make out a complete copy of the record of said case and to certify the same to be a true and complete copy, and cause the same to be transmitted to the December term of the supreme court at Milledgeville, that the errors alleged to have been committed may be considered and corrected.

Nov. 9th, 1867. D. A. VASON,
J. S. C., S. W. C.

GEORGIA, *Sumter County:*

Be it remembered that on the day of April, 1869, during the regular term of the superior court of said county of Sumter, his honor J. M. Clarke, judge of the superior courts of the southwestern circuit, presiding there, came on the cause of Benjamin Mordecai vs. James Stewart and Allen S. Cutts, the same being a complaint and a petition to transfer the same to the fifth circuit court of the United States for the southern district of Georgia; and of Benjamin Mordecai

vs. James Stewart, which was a rule nisi to foreclose mortgage and transfer the same to the fifth circuit court of the United States for the southern district of Georgia; and of Benjamin Mordecai and of James Stewart vs. Benjamin Mordecai and Allen S. Cutts, it being a
106 bill in equity, &c., and petition to transfer the same to the fifth circuit court of the United States for the southern district of Georgia; which motion for the transfer of said cases it was agreed upon by counsel on both sides should be tried together, and upon the sounding of said cases, the honorable J. M. Clark, judge as aforesaid, declined to preside in said cases, because of his relationship to one of the parties at interest; whereupon the parties, by their counsel, agreed that said motions should be heard before Adam R. Brown, esq., an attorney at law and member of the bar of said court, a copy of which agreement will appear in the transcript of the record; and the cases having been called by the said Adam R. Brown, esq., and the parties, by their counsel, having announced ready, counsel for Mordecai read his petition for transfer and his affidavit upon which said petition was founded, when counsel for Stewart and Cutts moved to traverse said affidavit; which motion, *other* argument had, was by the said Adam R. Brown, judge pro hac vice, refused; to which the said Stewart and Cutts, by their counsel, excepted. The motion to transfer said cases then came on, and after argument the said *motion to transfer said cases then came on, and after argument the said* motions were by the said Adam R. Brown, esq., granted, and orders passed transferring said cases to the fifth circuit court of the United States for the southern district of Georgia; to which rulings and orders the said Stewart and Cutts, by their counsel,
107 excepted, and now charges in this their bill of exceptions the same to be erroneous, upon the following grounds:

1st. That the said Mordecai had elected his jurisdiction by bringing his action in said superior court of said county of Sumter, and was bound by that election.

2d. That the said Cutts, one of the respondents in said bill in equity filed by said Stewart, is a resident of said State of Georgia and in said southern district of Georgia, and therefore no comple' justice can be done the parties in said fifth circuit court of the United States has no jurisdiction to try said causes. Therefore, the said Stewart and Cutts, by their counsel, prays that this bill of exceptions be signed and certified to the December term next of the supreme court of the State of Georgia, in terms of law in such cases made and provided.

HAWKINS & BURKE,
LYON, DEGRAFFENREID & IRWIN,
Attys. for Plff. in Error.

AMERICUS, *May 21st*, 1869.

I, Adam R. Brown, selected by the parties, through their counsel, as judge pro hac vice to try said causes, do hereby certify that the foregoing bill of exceptions is true and contains all the evidence material to a clear understand of the errors complained of; and the clerk of the superior court of Sumter County is hereby required and ordered to make out a complete copy of the record of said causes and certify
108 the same to be such, and cause the same to be transmitted to the December term, 1869, of the supreme court of Georgia, that the errors alleged to have been committed may be revised and corrected.

ADAM R. BROWN,
Judge pro hac vice.

I acknowledge due and legal service of the within bill of exceptions without more, May 27th, 1869, protesting that no motion to traverse was made, and the cases were not tried together.

NESBITS & JACKSON,
Attys. for Mordecai.

Filed in office May 22nd, 1869.

A. G. RONALDSON, *Clerk.*

B. MORDECAI
vs.
A. S. CUTTS & JAMES STEWART. } Complt. & petition to transfer case.

Upon hearing the foregoing petition and the argument of counsel, it is ordered by the court that the causes in said petition stated the removal from this court to the fifth circuit court of the United States for the southern district of Georgia, as herein prayed for, petitioner having made affidavit and given bond and security as required by law; and it is further ordered that said petitioner enter into said fifth circuit court of the United States for the southern district of Georgia, for the first day of its next session, copies of all processes, pleadings, depositions, testimony, and other proceedings in this court, and do all other
109 and appropriate acts required by the laws of Congress of the United States; and further, that petitioner pay the costs which have accrued in said cause prior to its removal, and such other and further costs as may be incurred by its removal as aforesaid.

A. R. BROWN,
By agreement and appointment of the Court, J. S. C., S. W. C.

BENJAMIN MORDECAI
vs.
JAMES STEWART. } Rule to foreclose mortgage and transfer case.

Upon hearing the foregoing petitions and argument of counsel, it is ordered by the court that the cause in said petition stated be removed from this court to the fifth circuit court of the United States for the southern district of Georgia, as in said petitions prayed for, petitioner having made affidavit and given bonds and security as required by law; and it is further ordered that said petitioner enter in said fifth circuit court of the United States for the southern district of Georgia, on the first day of its next session, copies of all processes, pleadings, depositions, testimony, and other proceedings in this court, and do all other and appropriate acts required by the laws of Congress of the United States for the removal of a suit from a State court to the circuit court of the United States; and further, that petitioner pay the costs which have accrued in said cause prior to its removal, and such further costs
110 as may be incurred by its removal as aforesaid.

A. R. BROWN,
By agreement of Counsel and appointment of the Court,
J. S. C., S. W. C.

JAMES STEWART
vs.
B. MORDECAI & A. S. CUTTS. } Bill and petition to transfer case to United States court.

Upon hearing the foregoing petition and argument of counsel, it is ordered by the court that the cause in said petition stated be removed

from this court to the fifth circuit court of the United States for the southern district of Georgia, as herein prayed for, petitioner having made affidavit and given bonds, with security, as required by law; and it further ordered that said petitioner enter in said fifth circuit [court] of the United States for the southern district of Georgia, on the first day of its next term, copies of all processess, pleadings, depositions, testimony, and other proceedings in this court, and do all other appropriate acts required by the laws of Congress of the United States for the removal of a suit from a State court into a circuit court of the United States; and further, that petitioner prays the costs which have accrued in said cause prior to its removal, and such further costs as may be incurred by its removal as aforesaid.

A. R. BROWN,
By agreement of Counsel & appointment of the Court,
J. S. C., S. W. C.

111 Supreme court of the State of Georgia.

ATLANTA, *Dec. 14th*, 1869.

The honorable supreme court met pursuant to adjournment. Present, their honors Joseph E. Brown, chief-justice, and H. K. McCay and Hiram Warner, judges.

JAMES STEWART & ALLEN S. CUTTS
vs.
BENJAMIN MORDECAI.

This case came before the court upon a transcript of the record from the superior court of Sumter, and, after argument had, it is considered and adjudged by the court that the judgment of the court below be affirmed.

Bill of cost: Ent'g case, $6.00; rec'd ass's, $6.00; remitter, $2.00; sherriff, $1.25—$15.25.

Supreme court of the State of Georgia.

CLERK'S OFFICE, *Atlanta, Dec.* 15, '69.

I certify that the above is a true extract taken from the minutes, and W. A. Hawkins paid the above bill of cost.
Given under my hand and seal of office.
[L. S.] E. D. HARRISON, *D. Clerk.*

Sumter superior court, April term, 1870.

It is ordered by the court that the foregoing remitter from the supreme court be entered on the minutes of the court, and that the
112 judgment of said supreme court contained in said remitter be, and the same is hereby, made the judgment of this court. It is further ordered that the cases to which said judgment applies and which the same was rendered be removed to the fifth circuit court of the United States for the southern district of Georgia, as heretofore ordered, and that copies of all processes, proceedings, depositions, testimony, and other proceedings in said cases in this court be entered in the said fifth circuit court of the United States for the southern district of Georgia by Benjamin Mordecai in this court by the first day of the next session thereof.

J. M. CLARK,
J. S. C., S. W. C.

GEORGIA, *Sumter County:*

CLERK'S OFFICE, AMERICUS, GA.,
June 20th, 1870.

I, Anderson G. Ronaldson, clerk of the superior court of Sumter Co., Georgia, do hereby certify that the foregoing 114 pages contain a true and complete copy of the pleadings, processes, depositions on file, and of record in this office in the cases of B. Mordecai against James Stewart and A. S. Cutts, and James Stewart against B. Mordecai and A. S. Cutts.

In witness whereof I have hereunto set my hand and affixed my seal of office this June 20th, 1870.

[L. S. OF THE COURT.] A. G. RONALDSON,
Clerk S. C.

113 Endorsement to original bill is as follows:

U. S. circuit court, so. dist. of Georgia. In equity. Salamon Root & Co., complainants, and Allen S. Cutts et al., defendants. Original bill and exhibits for injunction, &c. Filed Nov. 14, 1871. Jas. McPherson, clerk. Nisbets & Jackson, sols. for compts.

Order for hearing at chambers, &c.

Ordered that the above bill and motion be heard at chambers at Atlanta, Georgia, on Monday, the first of July, before Judges Woods & Erskine, if the presence of both can be then had; if not, before Judge Erskine alone.

JOHN ERSKINE,
Judge.

MAY 3RD, 1872.

)Endorsement:) U. S. circuit court, so. dist. of Georgia. In equity. Salamon Root & Co., compl'ts, and Allen S. Cutts et al., defandants. Order for hearing at chambers in Atlanta on July 1 next. Filed May 3d, 1872. Jas. McPherson, clerk. J. Jackson.

114 Answer *Answer of Allen S. Cutts.*

SALAMON ROOT & CO.	Equity in the fifth circuit court U. S. for the southern district of Georgia.
vs.	
ALLEN S. CUTTS, WILLIAM D. STEWART, ADMINISTRATOR, et al.	

The separate answer of Allen S. Cutts, one of the defendants.

And now comes the defendant and, without waiving all and every objection and exception to the many errors, uncertainties, and other imperfections in his said bill contained, for answer to said bill, or to so much and such parts thereof as he is advised is material or necessary for him to answer, answering, says:

That he cannot state and admit that on the tenth day of August, eighteen hundred and sixty-seven, he and James Stewart were indebted to the said Benjamin Mordecai in a large amount of money; but he admits that on the eighth day of January, eighteen hundred and sixty-three, the said James Stewart, purely to accommodate this defendant, and without any interest or participation in the consideration of said

promissory note and mortgage, did execute and deliver the same, and this defendant then and there, for the consideration hereinafter set up, indorsed and transferred to said Mordecai the said promissory note; but this defendant most positively and emphatically denies that the said note of forty-four thousand dollars and the mortgage was given
115 in settlement of any indebtedness from the respondent or the said James Stewart prior to the late war, or upon any gold-consideration or upon any other consideration, other than that which is hereinafter expressed and alleged; and this defendant denies most positively that the said James Stewart was indebted to the said Mordecai before the war, or during the war, or since the war, except as by the making and delivering the note and mortgage aforesaid as security or an accommodation-maker may make him liable thereon.

And in further answer to that part of complainant's bill of complaint, defendant says that on the sixth day of January, eighteen hundred and sixty-three, he bought of Benjamin Mordecai, then of the State of South Carolina, two hundred and twenty (220) Georgia & Pensacola Railroad bonds, at four hundred dollars each, in confederate currency, the said bonds then being ninety per cent. below par, in confederate money, and selling, at the same time, in confederate money, at eighty cents in the dollar; also two hundred and twenty coupons payable the first day of July, eighteen hundred and sixty-one, (1861,) at twenty dollars each; two hundred and twenty coupons, payable first July, eighteen hundred and sixty-two, at twenty dollars each; two hundred and twenty coupons, payable the first of January, eighteen hundred and sixty-three, at twenty dollars each; interest on the first two hundred and
116 twenty coupons, and also upon the whole of the coupons to the sixth of January, eighteen hundred and sixty-three, the date of the purchase, making, in the aggregate, bonds, coupons, and interest, the sum of one hundred and six thousand six hundred and seventy-nine dollars and nineteen cents.

The purchase of said bonds and coupons was consummated on that day, though negotiations had been carried on by respondent with said Mordecai for some time previous thereto, as will appear by reference to a letter written to respondent in December, 1862, and signed by the said Mordecai; that on the said sixth day of January, 1863, respondent paid the said Mordecai, in part payment for said bonds and coupons, and interest thereon, the sum of twelve thousand six hundred and seventy-nine dollars and nineteen cents, in confederate money or confederate treasury notes; and also, in a short while thereafter, the sum of fifty thousand dollars, in confederate treasury notes, in part payment for said bonds, coupons, and interest, and the mortgage and note was the balance due the said Mordecai for said bonds, coupons, and interest. Said trade and purchase was based entirely and solely upon the confederate consideration set out in the bill of sale hereto attached and marked "Exhibit B," with the usual leave of reference; and this defend-
ant says that the said Benjamin Mordecai so regarded and under-
117 stood that the same was payable in confederate currency and so expressed himself as late as 1868. And this defendant says that at the time said note was given confederate treasury notes or confederate money was worth in market three for one, and when the same became due and payable, worth twenty-one for one; that is, one dollar in gold was worth twenty-one in confederate notes. And defendant insists that, if indebted to the said Mordecai at all, it is for the amount and value of said note, sealed according to the intent and meaning of

the contract and the agreement of the parties, lessened by the fact that the bonds themselves were at a discount far below the value of confederate money; so that the value obtained and received by this respondent was worth much less than confederat e money, and they were rendered less valuable, as appears by the bill of sale, in that the Georgia & Pensacola Railroad refused to pay said coupons, and they are now utterly worthless, and the corporation that issued them insolvent, and has been for many years. And this defendant submits to this honorable court that it would be inequitable and unjust to compel him or his security to pay any other than the fair and just value and consideration of his contract.

And, in further answer to said bill, this defendant says that the said Benjamin Mordecai was indebted to him in a large sum of money
118 for usur'ous interest paid him. That in 1858 he paid him five thousand dollars and in 1869 ten thousand dollars, both of which were wholly usur'ous; and also, at other times, in 1856, 1857, 1858, 1859, and 1860, he paid him large amounts of purely usur'ous interest, amounting to ten thousand dollars. By reason of the destruction by fire of his books and papers, he cannot state the exact amounts and times of the several payments. That, owing to the results of the late war, he became very much embarrassed and unable to pay his indebtedness, which was large, being nearly ($200,000) two hundred thousand dollars; upon nearly all of which his friend, James Stewart, was security; and, to save him as much as he was able, he assigned to him all his right in and to the said claim against Mordecai for usur'ous interest he had paid him as aforesaid. This assignment and covenant took place some time in the year 1866.

In further answer to the bill, this defendant admits that the property mortgaged is properly set forth and described in said bill, and that the proceedings in Sumter superior court alleged were had and the cases transferred and are now pending in this honorable court; but defendant now here insists that they were thus transferred illegally, and prays the same may be enquired of by this honorable court. In reference to this allegation of the bankruptcy of the said Benjamin Mordecai,
119 the time of the application, and his discharge, this defendant knows nothing of his own knowledge, but has heard that he was adjudged a bankrupt; but this defendant never received any notice of the same, either as a creditor or debtor of the said Mordecai.

In further answer, respondent says that he knows nothing of the transfer by Mordecai to the complainant of the note or mortgage on the tenth day of August, eighteen hundred and sixty-seven, nor did he ever hear of the said plaintiff's ever having any interest therein until long after said time; but that he does know and says that in October, 1867, the said Benjamin Mordecai was present in the city of Americus, contesting said bill, and the litigation then pending in Sumter superior court, then and there offered to take and receive in payment thereof the sum of seventy thousand dollars, or some such sum; that he was the recognized party in the said court and in the supreme court of Georgia; and defendant is advised and believes that the said S. Root, one of the complainants, well knew that the said Mordecai was thus contesting said note and mortgage.

This defendant cannot answer, from his own knowledge or from information, whether the said Mordecai was indebted to complainant; he knows nothing of the matter, and insists of proof of the same by
120 complainant. Defendant admits the death of Stewart since the removal of the cases to this honorable court, and that William D.

Stewart is his administrator; but this defendant cannot say that the heirs at law of the said James Stewart are correctly set forth in complaint, but his information and belief is that they are correctly named, at least as to number.

And, in further answer to said bill, this defendant says that of his own knowledge he cannot state that the heirs at law have divided the mortgaged property, but his information and belief is that they have divided the said mortgaged property, and the balance of said estate among the heirs, but, as he is informed, with bond and security from each one to pay his or her part of the said estate; but of the matters connected with the administration of said estate and the division and the intent of the parties, the defendant knows nothing.

And, in answer to said bill further, this defendant says that he is of opinion that the property mortgaged, being three large brick buildings and one-half of another large brick, all two stories high, and situated in the most populous and business part of the city, and the hotel property, are worth the sum of at least forty-three thousand five hundred dollars.

Defendant is informed that the estimate put by the dividers among the heirs rated the property as follows: The hotel-property, $10,-
121 000; the one-half of the Felder building, at $6,000; two-story building on Cotton street, at $7,500; the adjoining building at $12,000, and the brick store on Lamar street, at $7,500.00, making that amount; but defendant is of opinion that the valuation of said property was a low one.

And defendant, in further answer, says that since the war, to wit, on the 17th day of March, 1866, he paid on said claim, and without any agreement that the same was a valid claim in greenbacks or gold, $15,325 in lands, which, before the war, was worth two and a half dollars per acre; said payment was then worth, in United States currency, the said sum of $15,325.

And having answered all the charging part of said bill relating to respondent, or so much and such parts as he advised is material or necessary for him to answer, in answer to the first interrogatory in said bill he says most positively that he and James Stewart were not indebted to the said Benjamin Mordecai, as charged in said bill, but were indebted as hereinafter set out in this answer, and not otherwise, and the said note and mortgage were given as alleged in this answer, and not otherwise.

To the second he answers that the mortgage was given to secure said note by the said James Stewart, and the copy is a true copy, as respondent remembers.

To the third he answers that the suit on the note and mort-
122 gage was brought by Mordecai, and the bill filed by Stewart, and the whole removed to this honorable court without an examination of the original; he cannot state whether they are true copies or not, but presumes they are.

To the fourth he answers that he only knows upon information that Mordecai applied and was discharged in bankruptcy, but he has no information, and does not know who is the assignee.

To the fifth he does not know that Mordecai has transferred his interest in said note and mortgage to complainant. He hears of S. Root being interested in said case in the year 1868, for the first time, when, on the call of said cases for a motion to transfer them to this honorable court, his honor James M. Clark, the presiding judge of Sumter superior court, announced that complainant, Root, had informed him

that he was interested in said cases, and that, on account of his kinship to said Root, he would not preside in said case. This was the first information defendant had of the interest claimed by complainant Root.

In answer to the sixth, he says that James Stewart is dead. He died in February, 1870, in Sumter County, and William D. Stewart became his administrator, who took out letters of administration on or about the day of , 1870. He gave as securities upon said
123 bond . He knows nothing of the condition of the estate, or whether an inventory and appraisement was made and returned. He has no copy of them or of the administrator's bond, and asks to be relieved from so attaching the same to this his answer.

To the ninth he answers that he does not know accurately the heirs or the shares of them. James Stewart died intestate, as this respondent was informed, and to the eleventh he answers that the estate, in the opinion of the defendant, is worth at least one hundred thousand dollars.

To the twelfth interrogatory he answers and says he knows nothing of the matter whether there was a division and whether under an order otherwise, except he has heard that a division of the estate was had.

To the thirteenth interrogatory he answers that he does not know anything concerning the matter inquired of, nor has he knowledge or information or belief concerning the matters inquired of in interrogatories 15, 16, 17, 18, 19, 20, 21, 22, and 23.

To the twenty-fourth he answers that four of the houses are of brick and insurable at per cent., and no more liable to fire than are ordinary brick buildings not adjacent to wooden structures. There are no wooden buildings adjoining or near by these four houses. The
124 hotel is a large two-story building made of wood and adjoining on the west two dilapidated wooden houses, and it not insurable here, though defendant thinks the land as valuable without as with the building. All of said buildings are within the fire-district of the city and nearer the centre thereof than any boundary.

To the twenty-fifth he answers that Thomas Stewart, William Stewart, Turner, William C. Dodd, and Plowden are regarded as solvent and responsible men, excluding the property received by them as covered by said mortgage. The others are not known by this defendant.

Twenty-sixth. He is unable to answer this interrogatory.

Twenty-seventh. This defendant does not hold any deed or any other evidence of title to any of said property, and has no interest in the same.

And this defendant, having fully answered the said bill to the best of his information, knowledge, and belief, prays to be discharged with his reasonable costs.

R. F. LYON,
W. A. HAWKINS,
Defendant's Solicitors.

GEORGIA, *Sumter County:*

Personally came before me Allen S. Cutts, who, on oath, says that the facts set out in the foregoing answer, so far as they depend
125 upon his own act and deed, are true of his own knowledge; and so far as they depend upon information derived from others, he believes to be true.

A. S. CUTTS.

Sworn and subscribed before me. Witness my hand and seal of office this first day December, 1871.

B. F. BELL,
Ordinary, S. C.

EXHIBIT A.—*Mordecai's letter.*

BANK OF THE STATE OF SOUTH CAROLINA,
Columbia, December, 1862.

A. S. CUTTS, Esq.,
Americus, Georgia:

DEAR SIR: Your favor of the 16th instant received. I will accept the proposition made me, to wit: That Mr. Stewart will give me a mortgage upon the property proposed, provided it is worth the amount he proposes to secure me for, and that it is covered by insurance, and said policy assigned. Should I have occasion to sell property to re-imburse myself, and it falls short of the amount of his indebtedness, I shall, of course, expect to hold him for the balance. I understand this to be his proposition. The balance of ($50,000) fifty thousand dollars, I shall be willing to take the titles of the Georgia & Pensacola Railroad for fifty thousand acres of land, as stated in your letter. This I understand to be your meaning, which gives me pleasure to comply with. With this understanding I will be with you the first week in January next.
126 I cannot be with you before. If, in the mean time, you make sales of any of the land, you can account to me when I see you. When I leave here I will deposit the bonds with the Southwestern Railroad Bank, subject to my order, in favor of Houstoun, president. Write me if this is our understanding.

Your obedient servant,
(Signed) B. MORDECAI.

Bill of sale.

Col. A. S. Cutts bought of B. Mordecai:

1863.

January 6.	To 220 Georgia & Pensacola Railroad bonds $500.00 each, at 80 cts	$88,000 00
	To 220 coupons, payable 1st July, 1861, $20	4,400 00
	To interest on same to 6th January, 1863	357 56
	To 220 coupons, payable 1st July, 1862, $20 each	4,400 00
	To interest on same to 6th January, 1863	181 86
	To 220 coupons, payable 1st January, 1863, $20 each	4,400 00
	To interest to 6th January, 1863	587 00
	To interest to 6th January, 1863	587 00
		$106,679 19
	Deduct cash	12,679 19
		94,000 00
	Mortgage	44,000 00
		50,000 00

127 *Depositions of James T. Nisbet and B. Mordecai.*

GEORGIA, *Bibb County:*

Before me in person came James T. Nisbet, one of the late law-firm of Nisbets, of Macon, in said county of Bibb, who, being duly sworn, deposes and says that said firm received from Benjamin Mordecai, then of Charleston, S. C., in June, 1861, for collection, a note of A. S. Cutts, dated 2d February, 1861, and due at one day, for $22,000, with a credit, March 6th, 1861, of $2,750; and a draft of A. S. Cutts, on Cutts & Johnson and James Stewart, accepted by said Cutts & Johnson and James Stewart, for $15,000, dated 22d October, 1860, and due 1st December, 1860, which draft was collateral security for said note; and three notes of James Stewart, indorsed by A. S. Cutts, for $10,000 each, each due at six months from date, and each dated April 20th, 1860, with certain instructions as to said papers, which will be seen by reference to the two letters hereto annexed, and made a part of this deposition; that the said Mordecai also sent the said firm for collection, through the Southwestern Railroad Bank of Charleston, another note of said A. S. Cutts, indorsed by Cutts & Johnson, dated 30th June, 1861, and due at six months, for $20,000. That said draft of $15,000, accepted by James Stewart, and Cutts & Johnson, and three notes of James Stewart, for $10,000 each, and said note of A. S. Cutts, indorsed by Cutts & Johnson, for $20,000, were sued by said firm, and before judgment, which was delayed by the absence of A. S. Cutts in the confederate service, were withdrawn
128 from suit, and the suits on them dismissed, and the said papers delivered up—the $20,000 note to the Southwestern Railroad Bank of Charleston, which held it as collateral, in November, 1864, said bank then being located temporarily in Columbia, S. C., and the balance early in 1866, to Benjamin Mordecai, or upon his order, to the makers, A. S. Cutts and James Stewart, deponent's decided belief being that they were delivered to Benjamin Mordecai about the middle of March, 1866, as he passed through Macon en route to Americus, Georgia, or soon after his return to Charleston. Deponent in making this deposition has refreshed and confirmed his recollection by reference to the collection-register and letter-files of his said late firm of Nisbets.

JAMES T. NISBET.

Sworn to and subscribed before me this 13th February, A. D. 1872.

LORENZO RIPLEY,
Notary Public.

CHARLESTON, S. C., 17*th June*, 1861.

Messrs. NISBETS, *Macon, Georgia.*

GENTLEMEN: I enclose for collection or immediate suit acceptance of Cutts & Johnson and James Stewart, payable one-fourth December, 1860, to order C. Y. Savage, $15,000. Also, A. S. Cutts, one note payable, two-fifths February, 1861, and upon which $2,730 is credited; apparent balance, principal, 19,270. But the balance is $15,000 less, and therefore only $4,270. The first-named paper being collected
129 by suit or otherwise, and being credited on the note, leaves the balance $4,270, the entire claim being for $19,270 and interest thereon.

You will therefore institute proceedings for the recovery of the acceptance for $15,000 and for $4,270 on the note, suing Cutts & Johnson and James Stewart for the $15,000, and A. S. Cutts for the $4,270.

As agreed upon, the Farmers' and Exchange Bank will forward to you to-day these notes of James Stewart for ten thousand dollars each for immediate suit. This paper ($30,000) is held by the F. and E. Bank as collaterals to secure payment of any indebtedness to the bank, and you will institute suit in their name. Your favors at hand. You will of course join in suit to get rid of the ne exit Cutts vs. Gilmer.

Yours, truly,

B. MORDECAI.

FARMERS' AND EXCHANGE BANK OF CHARLESTON, S. C.,

Charleston, 17th June, 1861.

Messrs. NISBETS,
Attorneys at Law, Macon Georgia.

DEAR SIRS: I enclose three notes, as particulars at foot, which you will please put in suit forthwith. Mr. Ben. Mordecai, who is interested in these notes, has written to you fully on this subject, and the suit will of course be conducted by you on the terms agreed to by Mr. Mordecai and yourselves.

Please acknowledge receipt and oblige, very respectfully,

J. S. DAVIES, *President.*

130 Three notes drawn by James Stewart in favor of A. S. Cutts, $10,000 each, due 23d October, 1860, protested for non-payment.

STATE OF LOUISIANA,
City of New Orleans:

In person before me came Benjamin Mordecai, the person whose signature is to the subjoined deposition, who, having been sworn, saith as follows:

That deponent is the Benjamin Mordecai to whom A. S. Cutts and the late James Stewart, of Georgia, were indebted on a sealed promissory note for forty-four thousand dollars, with a credit thereon of date March 17, 1866, of fifteen thousand three hundred and twenty-five dollars, said note dated 8th of January, 1863, and secured by mortgage on real estate in Americus, Sumter County, Georgia.

Deponent brought suit in Sumter superior court, in the State of Georgia, and took steps to foreclose said mortgage, according to the laws of Georgia, and removed the same to the circuit court of the United States for the southern district of Georgia.

Being largely indebted to Solomon, Root & Co, deponent transferred to them the claim so pending under a contract, a copy of which is attached hereto, setting out in full the date, character, and condition of said transfer, marked "Exhibit A," and made part of this deposition.

131 Deponent states that the origin of the indebtedness of the said A. S. Cutts and James Stewart to him is as follows: In the years 1859 and 1860, A. S. Cutts was largely indebted to deponent for borrowed money, and, in order to borrow more money from deponent, as well as to secure that already owing, the said A. S. Cutts gave to deponent as collateral security two hundred and twenty bonds, of $500 each, of the Pensacola & Georgia Railroad Company, of the value in all of $110,000, nominally. When the notes of said Cutts matured, he was unable to pay them, and they lay over until the said Cutts offered to sell, and sell them to deponent for $66,000 in gold, or its equivalent, at

the rate of 60 cents on the dollar. After the purchase of these bonds from said Cutts, deponent ascertained from Colonel Houstoun, the president of the Pensacola & Georgia Railroad Company, that Cutts had no right to sell said bonds; that the company had loaned them to him; that the company held, as collateral for the return of these bonds, upwards of one hundred acres of land, thirty-five to forty negroes, and $15,000 in railroad-stock. The said Cutts was a heavy contractor on said road, and could get no settlement with the road nor possession of this large property in lands, negroes, and railroad-stock until he returned these bonds. Moreover, he had sold a large body of the lands to Ross & Seymour, of Macon, Georgia, and could not make them title
132 and put them in possession until he returned these bonds. Mr. James Stewart was largely interested for Cutts, having indorsed for him to very heavy amounts, and was deeply interested that Cutts should get back these bonds from deponent in order that he might realize as much as possible in settlement with the said railroad company.

Moreover, the said A. S. Cutts and James Stewart owed deponent a large amount of money, for which he held, as collateral security, twenty thousand dollars of railroad-stock, as well as notes of said James Stewart. Under these facts and in view of the great need of the said Cutts to settle with said railroad company, and the almost equal need of said Stewart, as his indorser, to have him settle, deponent sold to Stewart and Cutts the said railroad bonds at eighty cents, amounting to eighty-eight thousand dollars, ($88,000.) Deponent remarked at the time of the sale that they were worth par, but as they—Stewart and Cutts—were in difficulty with said company for settlement, and Cutts had done quite a large business with deponent, deponent consented to take eighty cents on the express condition and with the distinct understanding that Stewart should become the principal debtor, and should secure what was not paid at the time by mortgage on real estate in said town of Americus, which Stewart, in consideration of his previous involvements with Cutts and of his indebtedness to deponent on said collat-
133 erals, agreed to do and did do. The bonds were then delivered to the authorized agent of Col. Houstoun, the president of said company, and said Stewart and Cutts went into possession of the lands, negroes, and railroad-stock held by the company, as aforesaid, and of the twenty thousand dollars of railroad-stock held by deponent as collateral. This settlement was made on the 8th of January, 1863, to relieve Cutts and Stewart, and at their instance and request; the consideration of the said note and mortgage was not confederate currency, nor was the note to be paid in that currency, but the whole transaction originated before the war, and the settlement was made upon a gold basis. The consideration was the bonds; the bonds brought Stewart and Cutts lands and railroad-stock, to say nothing of the negroes, worth largely more than the value put upon them in good currency, and enabled them to realize as contractors from the said railroad company and to settle with them.

Deponent further states that on the 17th of March, 1866, he went to Americus to have a settlement with said Cutts and Stewart.

Deponent exhibited his account against Cutts and Stewart, which at that time amounted to the following sums:

1863, January 8th, sealed note	$44,000
Interest to March 12th, 1866	9,787
(Fifty-three thousand seven hundred and eighty-seven dollars)	$53,787

134 At the same time deponent also exhibited his account—ante bellum—against said Cutts, (for which he held notes on Stewart as collateral,) amounting at said date to the sum of thirty thousand dollars, in notes of ten thousand dollars each, to secure the debt against Cutts of $24,282.31, from which deponent deducted, on account of interest and commissions, to which Cutts objected, in the sum of nine thousand three hundred and ninety-nine dollars one ct., $9,399.01, leaving balance due on this account fourteen thousand eight hundred and eighty three dollars and thirty cents, ($14,883.30,) making the entire indebtedness of said Stewart & Cutts at that time to deponent sixty-eight thousand six hundred and seventy dollars and thirty cents, ($68,670.30.)

As this was not regarded a confederate debt, in the settlement on the 17th of March, 1866, deponent gave up to Cutts three notes of James Stewart of ten thousand dollars each—Cutts & Johnson's acceptances—including interest, $39,147.17, note due the Railroad Bank, including interest, $10,113.80, in all $79,262.57, (seventy-nine thousand two hundred and sixty-two dollars and fifty-seven cents,) all of the above obligations made before the war. These particulars are taken from the bills-receivable book of deponent, now in his possession. Deponent agreed to take in part payment of the debt twelve thousand acres
135 of the land the said parties had redeemed with these bonds at $2.50 per acre, which paid off the said sum of $14,883.30, and the balance, $15,325.00, was credited on the said note and mortgage, leaving said Stewart & Cutts indebted to deponent on the 17th of March, in the year 1866, $38,462.53.

Deponent was at that same time offered lands of the same quantity and quality so redeemed from said railroad company for this balance due on said note and mortgage; that neither Stewart nor Cutts pretended that the said balance was not payable in good currency of the United States, as any other good and valid debt, nor did deponent ever dream that such was the contract, or would be set up by them as such, until they set it up as a defense to the suit brought by deponent against them on the note and mortgage. At this time, 17th of March, 1866, they certainly said that they had no defense to said note and mortgage, and begged indulgence and time on their debt.

Deponent further states that more than six months after this time, to wit, on the 20th of September, 1866, he agreed, at the solicitation of said Stewart & Cutts, to relinquish his mortgage on the hotel-lot in Americus for $7,000 in cash, payable, according to his recollection, either the 1st of January or 1st of March, 1867, and one thousand acres of land in the State of Missouri, and a contract to that effect,
136 drawn up by Messrs. Scarborough & Goody, deponent's counsel, was executed by said Stewart, which afterwards fell through. Cutts & Stewart's lawyers, deponent believes, suggesting this defense as a pure afterthought and advising them not to comply with their contract.

Deponent further states that Gilmore, of the firm of Gilmore & Cutts, then contractors on the Pensacola & Georgia Railroad, offered him the entire body of land previously alluded to, at $1 per acre; this before the war. Deponent further states that he was adjudged a bankrupt in December, 1871, and has no interest in this matter now, directly or indirectly, and is a disinterested witness, except in so far as he wishes to see a just debt paid to the parties entitled; that long before he was adjudged or had made application to be adjudged a bankrupt, being largely and justly indebted to Solomon, Root & Co., he assigned them

this note and mortgage as aforesaid, and thus parted with all right and title to or interest therein.

BENJAMIN MORDECAI.

Sworn to and subscribed before me this eleventh day of January, 1872.

[L. S.] NABUR S. KER,
United States Commissioner for the District of Louisiana.

137 *Separate answer of William D. Stewart, admr.*

Separate answer of William D. Stewart, administrator of James Stewart, deceased, are in his own right and as guardian for Fanny, Katie, and Edward Stewart, minor children, and James Stewart, junior, deceased, and as agent of Robert H. McMullen.

And now comes the defendant, and, without having any objection to the many errors, imperfections, and uncertainties in complainant's bill contained, and for answer to so much and such parts thereof as he is advised is material or necessary for him to answer, answering, says he cannot state and admit that, on the tenth day of August, eighteen hundred and sixty-seven, that Allen S. Cutts and his intestate, James Stewart, were indebted to Benjamin Mordecai in a large sum of money, but he admits that, on the eighth day of January, eighteen hundred and sixty-three, his intestate, the said James Stewart, purely and without any interest or participation in the consideration of the said note or mortgage, did execute and deliver the same to the said Benjamin Mordecai, or to the said Allen S. Cutts, who then and there, for the consideration hereinafter expressed between the said Mordecai and Cutts, endorsed and transferred the said promissory note to the said Benjamin Mordecai. But this defendant most positively and emphatically denies
138 that the said note of forty-four thousand dollars and the said mortgage was given for any indebtedness of the said Allen S. Cutts and James Stewart, deceased, or either of them, prior to the late war, or upon any gold consideration, or upon any consideration other than that which is hereinafter set out and alleged. And this defendant most positively denies that the said James Stewart, his intestate, was indebted to the said Mordecai before the late war, or during the said war, or since that time, except as by the making and delivering the said note and morgtage aforesaid, as security or accommodation maker for the said A. S. Cutts, may have made him liable thereon.

And in further answer to complainant's bill, defendants says that, on the sixth day of January, eighteen hundred and sixty-three, the said Allen S. Cutts bought of the said Benjamin Mordecai, then of the State of South Carolina, two hundred and twenty Georgia & Pensacola Railroad bonds, at four hundred dollars each in confederate currency, the said bonds then being twenty per centum below par, in said confederate currency, and selling at the time in confederate money at eighty cents in the dollar; also two hundred and twenty coupons payable the first day of July, eighteen hundred and sixty-one, at twenty dollars each, with interest thereon to the sixth day of January, 1863; also two hundred and twenty coupons, payable the first day of July, 1862, with
139 interest to the sixth day of January, 1863; also two hundred and twenty coupons due the first of January, 1863, both the latter as well as the former at twenty dollars each, and interest to the sixth day of January, 1863, the date of said purchase; making in

the whole the sum of one hundred and six thousand six hundred and seventy-nine dollars and nineteen cents. The purchase of said bonds, coupons, and interest thereon was consum'ated on the said sixth day of January, 1863, though the said Mordecai and Cutts had been corresponding and negotiating concerning said trade prior to said time, as appears by the letter of the said Mordecai, dated in December, 1862, accepting the offers of said Cutts, and also as this defendant has been informed both by the said Mordecai and the said Cutts. This defendant was familiar with all the business transactions of his father, the said James Stewart, for, on account of his age and infirmity for many years prior to his death, this defendant acted as his agent and transacted a great deal of his business.

This defendant, in further answer to said bill, says that on the said sixth day of January, 1863, the said Allen S. Cutts paid the said Mordecai, in part payment for said bonds, coupons, and interest thereon, in cash, the sum of twelve thousand six hundred and ninety-nine dollars and nineteen cents in confederate money or treasury notes; also, in a short time thereafter, he paid the said Mordecai, in the same
140 currency, to wit, confederate treasury notes, and in part payment for said bonds, coupons, and the interest thereon, the sum of fifty thousand dollars, which said amount' were paid and accepted by the said Mordecai, in confederate money, in pursuance of and in accordance with the contract as contained in said bill of sale of said bonds, coupons, etc., and the said mortgage and note of forty-four thousand dollars was given in payment of the balance then due for said bonds, coupons, and the interest thereon. It was then, and before and afterwards, understood and agreed that the same was payable in the same confederate-money currency as was the other. Said trade and purchase was based entirely and solely upon a confederate basis and consideration, neither party having any other idea or thought but that the word dollars there used in said note and mortgage meant the confederate-money dollar then in circulation, and constituting the only money in circulation in the southern country. This is manifest from the said letter of the said Mordecai, the bill of sale to said Root, the receiving by the said Mordecai of the greatest part of said consideration in the said confederate currency, and the additional fact that the said bonds and coupons, when bought by the said Cutts, were then at so reduced a value as to be worth much less than the pretended money then in circulation; and this defendant says that, so late as the year
141 eighteen hundred and sixty-six (1866) the said Mordecai informed respondent that the said note was payable in confederate money.

And this defendant says that, further answering, at the time said notes became due the confederate currency, as well as the price and value of the said bonds, had greatly depreciated in value, so that the said money, in which the said note and mortgage was payable by the contract, was worth only one-twentieth of the value of gold, and was worth only the said twenty for one—that is to say, one dollar in gold was worth twenty dollars in said currency, and that said bonds bought by Cutts, with the coupons attached, were of less value than the said confederate currency; and this defendant respectfully submitts to this honorable court of equity, that if his intestate's estate is liable to the said Mordecai at all it is only for the real amount and value of said note and mortgage, according to the contract and agreement of the parties, and not according to the then fabulous amount rep*rep*resented in the word dollar, and, therefore, he says that the same ought to be scaled, in accordance with the contract of the parties, to the real amount

of good money, to be lessened twenty per cent., from the fact that said bonds and coupons themselves were only worth eighty cents in the dollar in the said confederate money. The value received by the
142 said Cutts from Mordecai was the said bonds, worth twenty per cent. less than so much confederate money, and they were of very little value on the account of the said Georgia & Pensacola Railroad refusing to pay the said coupons, and this defendant has been informed and believes the fact to be that they are now utterly worthless and without value, and that the said corporation that issued them is wholly insolvent, and has been for many years; and this defendant insists that it would be unjust and inequitable to compel the estate of the said Stewart to pay anything more than the amount fairly due on said contract, and he asks that the scaling of said nominal contract to its true import and meaning is consonant with the strict rate of equity, and violative of no principle of law.

And in further answer to said bill, this defendant, as the administrator of the said James Stewart, says that the said Mordecai had during the years from eighteen hundred and fifty-six up to the first of January, 1861, *had* loaned the said Cutts large amounts of money, and during those years has received from said Cutts large amounts of usur'ous interest, the precise amount of all which this defendant does not know, but is informed, and believes that it amounts to the large sum of twenty-five thousand dollars. He is informed that Cutts paid him in
143 1858 the sum of five thousand dollars at once, and in 1859, the sum of ten thousand dollars; at another time the whole of said sum, being wholly usur'ous, and ten thousand dollars at other times, and he believes he will be able to prove the same by said Mordecai and Cutts. And this defendant says, "that by the result of the war, and the consequent loss to said Cutts, he became utterly unable to pay his large indebtedness, upon most of which the intestate was security." He, the said Cutts, to waive the said James Stewart as much trouble as possible, assigned and transferred to him his claim and right against the said Mordecai for the said usury interest he had paid him, and for which the said Mordecai was liable. This debt and claim was transferred and assigned by the said Cutts to the said James Stewart some time during the year 1866. And this defendant admits that the property mortgaged is property described and set forth in complainant's bill, and the mortgage thereto attached, and that the proceedings alleged occurred in the Sumter superior court, and the cases were transferred, and are now pending in this honorable court, but he here insists that they were thus illegally transferred, and prays the same may be enquired of by this honorable court.

In further answer to said bill of complaint, respondent says in reference to the bankruptcy of the said Mordecai, the time of said application, and his discharge, he knows nothing of his own knowl-
144 edge, but has been informed, and believes the fact, that he was adjudged a bankrupt, but of his own knowledge he knows nothing, nor did he, as administrator of the said James Stewart, ever receive any notice thereof, nor has he ever been called upon by the assignee for payment of the said debt now sought to be enforced against his intestate.

And, in further answer to said bill, this defendant says it may be true, as charged in complainants' bill, that the said Mordecai, on the tenth day of August, 1867, transferred or assigned to the said complainants, as collateral security, the said note and mortgage; but this defendant never heard of such a transfer, or that the complainants had any inter-

est in the same until long after said 10th of August, 1867; but this defendant does know and says, that, in the month of October, 1868, the said Benjamin Mordecai was present in the city of Americus, Georgia, controlling and claiming said note and mortgage, and directing the litigation there pending in Sumter superior court, and then and there offered to take and receive, in payment of the same, a much smaller sum than is now claimed, to wit, the sum of twenty thousand dollars, or some such sum. He was the party in said court and in the supreme court of the State, and defendant believed that complainant, Root, well knew that the said Mordecai was thus controlling said note and mortgage. He cannot admit or deny that the said Mordecai was indebted to the said complainants. He knew nothing concerning the same, and insists on proof of the same before this honorable court.

And, further answer to complainants' bill, this defendant says
145 that, since the removal of said cases from the superior court of Sumter County to this honorable court, that the said James Stewart departed this life intestate, and this respondent has been appointed his administrator; that the heirs at law of said James Stewart, deceased, are this respondent, Thomas H. Stewart, Martha Turner, wife of Joseph P. Turner, Fannie, Eddie, and Katie Stewart, minor children of James Stewart, jr., deceased, and represented here by respondent, who is their guardian; Eliza Dodd, wife of William C. Dodd, Matilda Plowden, wife of Edward J. Plowden, and Robert McMullen, only son of Mary A. McMullen, formerly Mary A Stewart, through his mother, is entitled to one share in said estate, and represented here by respondent, who is his attorney in fact, being seven distributees.

In further answer respondent says and admits that there has been a division among the heirs at law of most of said estate, but denies that the same was in utter disregard of his duty as administrator, but says that said James Stewart left a large estate, consisting largely of lands and city property in the city of Americus, of the value of eighty thousand dollars; that all of the heirs of said estate were of full age, except the children of James Stewart, jr., deceased, who was represented by respondent as their legally-constituted guardian; that said estate was almost entirely free from debt, unless this honorable court shall hold this mortgage and note set up in complainants' bill to be a large debt; that this claim had been tried in Sumter superior
146 court in the life-time of respondents' intestate, and a verdict returned by the jury for defendant, and that the said Allen S. Cutts had transferred and assigned to respondents' intestate his claim for usur'ous interest, amounting to the large sum of about twenty-five thousand dollars, or other such large sum. And this respondent, believing that it was for the best interest of the distributees and the creditors, and believing the mortgaged property was entirely adequate to pay off and discharge whatever might be found due on said mortgage and note, and knowing that said estate was abundantly able to pay all of its debts, made application, as administrator of said estate, to the ordinary of Sumter County for competent appraisers to divide said estate, or the bulk of the same, between the distributees of said estate, but with no intention on his part, nor any of the heirs, as he believes, to delay or defraud the said Mordecai, or any assignee, of his rights, but with the sole purpose and view of putting the heirs at law in possession of their estates, and, at the same time, secure the payment of all the debts of the intestate. Said application was resisted by the said Mordecai, or his counsel, said ordinary not granting said application, of which decision respondent, by his counsel, entered an appeal,

which is now pending and is undetermined in the superior court of Sumter County.

Whereupon the said heirs, and after the said Mordecai failed to press said appeal or bring the same to trial, entered into a written contract or agreement for the purpose of dividing the bulk of said estate,
147 the terms and conditions of which contract or agreement will more fully appear by reference to copy of said contract or agreement hereto attached, and marked "Exhibit A," and which he prays may be taken as part of this his answer, with leave of reference as often as may be necessary, by the terms of which contract or agreement the said estate was to be divided equally among the said heirs, and each heir receiving his or her portion, and, before receiving the same, should execute and deliver to the respondent, as administrator, as aforesaid, both with good security to indemnify and save harmless this respondent, and to pay one-seventh of all debts and recoveries against said estate, and all expenses and costs; that, in pursuance of said contract or agreement made with full consent of all distributees, and by persons selected, and by the advice of counsel, to wit, on the twenty-first of November, eighteen hundred and seventy, proceeded to divide said estate in the following manner, to wit, by arranging the property in seven shares, as near equal as the dividers might deem equitable, the division to be made in kind, if possible, if not, to be made equal by payments from the greater to the smaller, as the commissioners might decide.

When the property contained in said mortgage, with other property, was drawn by the following persons: Half the hotel property was drawn by Thomas H. Stewart, valued at five thousand dollars; one-half of the brick store on the corner of Lamar and Cotton street, known as the Masonic Lodge, was drawn by Joseph P. Turner, in right of his wife,
148 Martha, valued at six thousand dollars; the other half of the hotel-property was drawn by Edward Plowden, in right of his wife, Matilda, and valued at five thousand dollars; the two-story building on Lamar street, known as the Kopp and Dann building, was drawn by respondent, as guardian for Edward, Fannie, and Katie, minor children of James B. Stewart, deceased, and valued at seven thousand dollars; one-half the corner building on Cotton street, known as the Harrold & Johnson building, was drawn by William C. Dodd, in right of his wife, Eliza, and valued at six thousand dollars; the other half of said building was drawn by respondent, and valued at six thousand dollars; the large two-story brick building adjoining the same, and on said Cotton street, was drawn by Robert McMullen, and valued at seven thousand five hundred dollars. These were the drawings of the mortgaged property. About thirty thousand dollars' worth of other property, consisting of plantations, houses, and lots, stock, etc., was also divided, so as that each one received, including what he or she received of the mortgaged property, ten thousand dollars' worth of property, or near that amount; that, by an exchange of property, Thomas H. Stewart became the owner of all the hotel property, and he is now in possession of the same, and receiving rents therefor; that William C. Dodd, in right of his wife, and respondent, are in possession of the house and lot known as the Harrold & Johnson house, and receiving rent for the same; that Joseph T. Turner, in right of his wife, is in possession
149 of the undivided half of the said Masonic Lodge, and receives rents for the same; that respondent, as guardian for Edward, Fannie, and Katie, is in possession of the said Kopp & Dann building, and is receiving the rents thereof; that Robert McMullen has sold and con-

veyed to Samuel H. Hawkins, of the city of Americus, the brick building on Cotton street, adjoining the Harrold & Johnson house, and that the said Samuel H. is in possession of and receiving rents thereof.

And, in further answer to said bill, respondent admits that there is no record of said partition and division in any court, nor has any return been made thereof to the ordinary of Sumter County, but respondent submits that that is no evidence of fraud, the creditors being fully protected thereby, and the heirs at law all being sui juris or represented by legal authority.

And, in further answer to the said bill, respondent says that all of said property, except the hotel-building, is in good repair and preservation, constructed of brick, and in the business part of Americus, and nearer the centre of the fire district than any boundary thereof, and insurable at any rate of per cent., and no more liable to destruction by fire than any other brick building in any well-regulated city. The hotel-building is constructed of wood, old, and is in a bad state of repair and not insurable, and liable to be burnt at any time; but, being a desirable locality and covering a large area, respondent believes
150 that the land is as valuable without as with the building thereon.

The whole of said mortgaged property is reasonably worth, at the present low prices, the sum of forty-five or fifty thousand dollars, and fully adequate to pay off and discharge said mortgage; and said respondent respectfully submits that complainant is in no danger of losing any part of any recovery which he may obtain on said note and mortgage, for, in addition to the lien which he has on the real estate, which is immovable, he has the bond and security of each of the heirs for the payment of said recovery; he has the security on the bond of respondent as administrator, and an estate in the hands of the heirs and respondent, in addition to the mortgaged property, of at least thirty or forty thousand dollars; and this respondent repels with scorn the insinuation contained in complainant's bill, that they would commit arson in the *con*struction of said mortgaged property to prevent complainants from enforcing their liens upon the same.

And in further answer, respondent says that they will submit to this honorable court all the equities which complainants may have on said mortgaged property; also the question as to whether the assignee of Mordecai and complainants can be made parties to the original bill, as well as the question as to whether complainants are not barred and prevented from prosecuting their present bill of complaint.

In further answer, respondent most positively denies that he
151 has wasted and mismanaged said estate, or that he has colleagued with the said heirs, or any other person or persons, to delay, to hinder, to defeat, or defraud the complainants, or any other creditor of said estate, but, as before stated, has added new securities for complainants. He denies that the securities on his administrator's bond are worth but little or no tangible property, but, on the contrary, are perfectly responsible and worth the sum of twenty thousand dollars, consisting of lands, etc., held visibly and notoriously, and that the parties holding said property, to wit, Thomas H. Stewart, Edward Plowden, William C. Dodd, Joseph T. Turner, and respondent, are men of responsibility, and owners of property to the amount of fifty thousand dollars.

And, in further answer to said bill, respondent says: That he knows of no other payment of said note and mortgage, except the sum of fifteen thousand three hundred and twenty-five dollars, paid by Allen S. Cutts since the late war, and he admits that he has made no payment since the death of the intestate, nor does he believe that the said Mordecai or

complainants are entitled to recover thereon, but believes that a large amount is due him as administrator, for usur'ous interest paid by said Cutts to him, as set up in this answer. Respondent denies any and all manner of confederacy, and also denies that the mortgaged property is inadequate security for said debt, but insists that the same is ample.

To the first interrogatory this respondent answers and says, that said James Stewart, deceased, and Allen S. Cutts are not indebted to B. Mordecai, as charged in said bill, but were indebted as hereinbefore set out in this answer, and not otherwise, and that the said note
152 and mortgage were given as alleged in this answer, and not otherwise.

To the second interrogatory he answers and says: That the mortgage was given to secure said note by the said James Stewart, and the copy is a true copy, as respondent remembers.

To the third interrogatory he answers and says: That the suits on the note and mortgage were brought by Mordecai and the bill filed by Stewart in Sumter superior court, and the cases transferred to this honorable court without an examination of the originals. He cannot state whether the copies are correct copies of the proceedings of Sumter superior court, but presumes they are correct.

To the fourth interrogatory he answers and says: That he has been informed that Mordecai made application and was discharged in bankruptcy, but has no information and does not know who is the assignee.

To the fifth interrogatory he answers and says: That he does not know that Mordecai has transferred his interest in said note and mortgage to complainant; he heard of S. Root being interested in said cases in the year 1868, for the first time, when, on the call of said cases for a motion to transfer them to this honorable court, his honor, James M. Clark, then presiding judge of the superior court of Sumter County, announced that complainant, Root, had informed him that he was interested in said cases, and on account of his kinship to said Root he would
153 not preside in said cases. This was the first information that respondent had of the interest claimed by Root.

To the sixth interrogatory he answers and says: He says that James Stewart is dead; that he departed this life February the fourth, eighteen hundred and seventy, and that respondent became his administrator on the first Monday of April, eighteen hundred and seventy.

To the seventh interrogatory he answers and says: That the securities on respondent's administrator's bond are Thomas H. Stewart, William R. Stewart, William C. Dodd. William R. Stewart is worth, in the opinion of respondent, twenty thousand dollars; he has no interest in said estate. Thomas H. Stewart is worth between nineteen and twenty thousand dollars, and, outside of what he received as heir of James Stewart, deceased, between nine and ten thousand dollars. William C. Dodd is worth, in respondent's opinion, outside of what he received as heir of said estate, about the sum of six or eight thousand dollars; with what he received as said heir, sixteen or eighteen thousand dollars. Respondent is worth, in his opinion, outside of what he received as an heir of James Stewart, about twelve thousand dollars; and with what he received as heir of said estate, about twenty-two thousand dollars.

To the eighth interrogatory he answers and says: That he has made a regular inventory of said estate, and an appraisement has been had thereon, and the same returned to the court of ordinary of Sum-
154 ter County. He attaches to this his answer certified copies of said inventory and appraisement with his returns in said estate, together with a certified copy of his administrator's bond.

To the ninth interrogatory he answers and says: The following are the heirs of the said James Stewart, deceased, Thomas Hill Stewart, William David Stewart, Joseph P. Turner, in right of his wife, Martha F. Turner; William C. Dodd, in right of his wife, Eliza A. Dodd; Edward J. Plowden, in right of his wife, Matilda J. Plowden; Robert M. McMullan, son of Mary A. McMullan, formerly Mary A. Stewart, and daughter of the said James Stewart, deceased; minor children of James R. Stewart, deceased, to wit, Fannie, Katie, and Edward, each one entitled to one seventh of the estate, except the minor children of James R. Stewart, each of whom is entitled to one-third of a seventh.

To the tenth interrogatory he answers and says: That he admits that James Stewart died intestate.

To the eleventh interrogatory he answers and says: That the estate is worth about eighty thousand dollars; each share worth one-seventh of eighty thousand dollars.

To the twelfth interrogatory he answers and says: That most of the property has been divided, which division took place on the sixteenth day of November, eighteen hundred and seventy, in the city of Americus, and the division was had under an order of no court, but by the agreement of the distributees.

To the thirteenth interrogatory he answers and says: That ap-
155 plication was made to the ordinary for an order to divide the estate, which order was refused. Counsel for Mordecai was present, objecting to said order, upon the ground of the existence of this note and mortgage.

To the fourteenth interrogatory he answers and says: Application was made and rejected in April, eighteen hundred and seventy. He attaches a copy of the application to this his answer, and the order refused by the court, and marked "Exhibit B."

To the fifteenth interrogatory he answers and says: That there was no return of said division to any court.

To the sixteenth interrogatory he answers and says: That there is no record of said division.

To the seventeenth interrogatory he answers and says: Deeds were made to the persons drawing their respective shares, except to the minor children to whom respondent was the guardian, by respondent to administrators, and he herewith attaches copies of said deeds.

To the eighteenth interrogatory he answers and says: The hotel property was drawn by Thomas H. Stewart and Robert Plowden, in right of his wife. The Kopp & Dann building was drawn by the minor children of James R. Stewart, deceased. The one undivided interest in the Masonic building was drawn by Joseph T. Turner, in right of his wife. The Harrold & Johnson building was drawn by William D. Stewart, and William C. Dodd, in right of his wife. The adjoining two-story brick building was drawn by Robert M. McMullen through his deceased mother, and the proper evidences are set out in this answer, and marked "Exhibit C."

156 To the nineteenth interrogatory he answers and says: That said division was in writing; a copy of the same with the deeds made thereunder are attached to this answer and marked "Exhibit D."

To the twentieth interrogatory he answers and says: That the reason the partition and division was not returned to the ordinary or any other court, was because this respondent did not deem it proper or necessary; the heirs all being of age, except the minor children of James R. Stewart, deceased; respondent deemed it unnecessary expenditure of money.

To the twenty-first interrogatory he answers and says: No particular

fund is reserved to pay this or any other debt, but the whole mortgaged property and the whole of this estate is subject to whatever recovery complainant may obtain; refunding-bonds were taken from the heirs, copies of which are appended to this answer and marked "E."

To the twenty-second interrogatory he answers and says: That Buchanan & Brother, Calloway and Barlord, W. T. Weaver, and the Good Templars, are tenants of respondent and W. C. Dodd, and pay rent to respondent and said Dodd. The whole rent of this building is about two thousand dollars per annum; some of the tenants pay quarterly and others monthly; this applies to the Harrold & Johnson building; the Kopp & Dann house is rented to Senell, and at a rental of about one thousand dollars, payable monthly; the other tenants this deponent cannot answer to.

157 To the twenty-third interrogatory respondent answers that none of the property is insured.

To the twenty-fourth interrogatory: All of the property except the hotel are brick tenements in a good state of repair and preservation, and not subject to fire any more than any other like tenements in a well-regulated city. The whole property is quite subject to fire, and while this answer was being written a fire occurred in a small house, but was soon extinguished. The whole remains uninsured. He does not know what the brick building could be insured at, never having had any experience in the insurance business. The hotel property is not insurable here. Brick tenements adjoin the brick house, and wood and dilapidated houses adjoin the hotel property on the east, and no buildings on the west, north, or south.

To the twenty-fifth interrogatory respondent has answered as to his property and responsibility, and as to the property and responsibility of Thomas Stewart and William C. Dodd. He thinks Joseph is worth in all, including the amount received from said estate, the sum of twenty-five thousand dollars, and without it fifteen thousand dollars; that Edward Plowden is worth about twenty thousand dollars, and perhaps twenty-five thousand dollars, and without the amount received from the estate worth twelve or fifteen thousand dollars. Rob-

158 ert McMullan is worth in all his estate, in the opinion of respondent, between twelve and fifteen thousand dollars, and without his interest in said estate from three to four thousand dollars. The children of James R. Stewart are worth, besides the amount received, an interest in four hundred acres of land, being the whole of said land except the dower of their mother, of the value of three thousand dollars.

To the twenty-sixth interrogatory he says that he excepts to his answer, who is the owner of each lot of said property. He is informed that Edward Plowden sold his half interest in the whole property to Thomas Stewart; that Robert McMullen has sold his interest to S. H. Hawkins; the other lots remain as they were divided. Respondent has made a mortgage on his interest, and there is still due thereof six hundred dollars; there is no lien or mortgage on the said property, except that Thomas W. Stewart has made a mortgage on the hotel property to secure the payment of his part of any and all securities that may be had against respondent as administrator and for his share of all expenses, and William C. Dodd has agreed to a like mortgage, which has not yet been obtained.

To the twenty-seventh interrogatory respondent answers that he has set out in the exhibits the deed and the true condition of such property.

And having answered the said bill, or so much and such parts thereof

as the defendant is advised is material or necessary for him to make
159 answer to, prays to be dismissed with his reasonable costs.

R. F. LYON,
W. A. HAWKINS,
Defendant's Counsel.

This defendant corrects the statements as to the mortgage on his property. Since the writing of the answer, he has paid the mortgage-debt. He also states that Mrs. C. Dodd had insured the Harrold & Johnson building.

GEORGIA, *Sumter County:*

Personally came before me William Stewart, who, on oath, says, that the facts set out in the foregoing answer, so far as they depend upon his own act and deed, are true of his own knowledge, and so far as they depend upon information derived from others, he believes to be true.

M. D. STEWART,
Administrator.

Sworn to and subscribed before me the 14th February, 1872.

W. B. SMITH,
U. S. Commissioner.

(Copy of original.)

GEORGIA, *Sumter County:*

This agreement made and entered into this the sixteenth day of November, eighteen hundred and seventy, between William D. Stewart, as administrator of the estate of James Stewart, late of Sumter County, deceased, of the one part, and William D. Stewart, in his own right
160 and as guardian of the persons and property of Fannie, Katie, and Edward, minor children of James R. Stewart, deceased, William D. Stewart, attorney in fact and agent for Robert McMullen, grandson of the said James Stewart, deceased, Edward J. Plowden and Matilda J. Plowden, Thomas H. Stewart, Joseph T. Turner and his wife, Martha F. Turner, William C. Dodd and his wife, Eliza A. Dodd, of the other part, being all of the distributees and heirs at law of the said James Stewart, late of Sumter County, deceased, witnesseth:

That whereas on the day of February, eighteen hundred and seventy, the said James Stewart departed this life, leaving the 'foremen-tioned persons as his heirs and distributees, and a considerable estate, consisting of real and personal property, choses in action, rights and credits; and whereas it is desirable that the said estate should be settled and divided with the least possible delay and expense, and those interested therein being of full age and sui juris, or are represented by proper guardians and agents: It is therefore hereby stipulated and agreed, mutually and respectively, that the said estate shall be divided as nearly as possible into seven equal shares by and between the parties aforesaid, said division to be made by the parties themselves, as nearly equal as possible, but if from the nature of the same, or from the number of distributees, the same is not susceptible of equal division, then the shares are to be made equal by payments of money from the greater to the smaller, to make the lots equitable and equal,
161 the said William D. Stewart agreeing to convey, respectively, the shares, when so divided and allotted, to the person or persons

selecting or receiving the same, as administrator as aforesaid, without warrantee, upon an execution and delivery to him of good and sufficient bonds, with security, to be satisfactory to him, of indemnification against the creditors of said estate, with covenants to contribute pro rata to any all receivers' and legal expenses in the further and complete administration of said estate.

In witness whereof the said parties have hereunto set their hands and seals, this the day and year aforesaid.

Signed, sealed, and delivered in the presence of—

(Signed) W. A. HAWKINS,
(Signed) N. A. SMITH, *Notary Public.* [L. S.]

W. D. STEWART, [L. S.]
Administrator.
W. D. STEWART. [L. S.]
W. C. DODD, [L. S.]
By W. D. STEWART.
W. D. STEWART, [L. S.]
Guardian for Fannie, Katie, & Edward Stewart.
W. D. STEWART, [L. S.]
Agent for R. M. McMullen.
THOMAS H. STEWART. [L. S.]
EDWARD J. PLOWDEN. [L. S.]
TILLA J. PLOWDEN. [L. S.]
J. P. TURNER. [L. S.]
M. F. TURNER. [L. S.]
E. A. DODD. [L. S.]
W. C. DODD. [L. S.]

162 GEORGIA, *Sumter County:*

I, N. A. Smith, a notary public in and for said county, do hereby certify that I have examined Matilda J. Plowden, wife of Edward J. Plowden, separate and apart from her husband, in relation to her signing the above agreement, and I certify that she signed the same freely, willingly, voluntarily, and of her own accord, and without the force or influence of her husband, and after being advised of the nature and effect of said agreement. This 16th day of November, 1870.

(Signed and sealed.)

N. A. SMITH,
Notary Public.

GEORGIA, *Sumter County:*

I, N. A. Smith, a notary public in and for said county, do hereby certify that I have examined Martha F. Turner, wife of Joseph P. Turner, separate and apart from her husband, in relation to her signing the within agreement, and I certify that she signed the same freely, willingly, voluntarily, and of her own accord, and without the fear or influence of her husband, and after being advised of the nature and effects of said agreement.

This 16th day of November, 1870.

(Signed and sealed.)

N. A. SMITH,
Notary Public.

GEORGIA, *Sumter County:*

I, N. A. Smith, a notary public in and for said county, do hereby certify that I have examined Eliza A. Dodd, wife of William C. Dodd, separate and apart from her husband, in relation to sign-

ing the within agreement, and I certify that she signed the same freely, willingly, voluntarily, and of her own accord, without the force or influence of her husband, and after being advised of the nature and effect of such agreement.

This 16*nd* day of November, 1870.

(Signed and sealed.) N. A. SMITH,
Notary Public.

GEORGIA, *Sumter County:*

To the honorable court of ordinary of said county:

The petition of William D. Stewart, administrator of the estate of James Stewart, deceased, respectfully shows that a majority of the distributees of the estate, if not all of them, desire that a large portion of the real estate belonging to the estate represented by petitioner should be distributed among them in kind. The said distributees, uniting with this petitioner, represent that, in their opinion, such distribution is practicable. Hence, petitioner prays your honor to grant that notice in the form of rule nisi do this day issue, under the official signature of the court, calling on the distributees of said estate to show cause, if any they have, at the next term of this court, why the portion of said estate proposed to be divided in kind should not be done, and why commissioners for that purpose should not then be appointed. And in duty petitioner will pray.

WILLIAM D. STEWART,
Administrator,
For S. H. HAWKINS, *Attorney.*

164 Court of ordinary, Sumter County, April term, 1870.

Upon hearing the foregoing petition, it is ordered that the distributees of said estate, to wit, William D. Stewart, Thomas H. Stewart, William C. Dodd, in right of his wife, E. A. Dodd; J. T. Turner, in right of his wife, M. F. Turner; E. J. Plowden, in right of his wife, Matilda Plowden; Robert M. McMullen, and William D. Stewart, as guardian of Fannie, Catherine, and Edward Stewart, minors, show cause, if any they have, at the next term of this court, why certain landed property belonging to the estate of James Stewart, late of said county, deceased, should not be apportioned among said distributees in kind, and why freeholders, for the purpose of making such division, should not then be appointed. It is further ordered by the court that service of this rule nisi be served on each of said distributees twenty days prior to the next term of this court.

Witness my hand and official signature this the fourth day of April, one thousand eight hundred and seventy.

J. M. STANFORD,
Ordinary.

We acknowledge due and legal service of the within petition and order nisi thereon April 4, 1870.

W. D. STEWART.
W. C. DODD.
E. J. PLOWDEN.
THOMAS H. STEWART.
R. M. McMULLAN.
W. D. STEWART,
Guardian of Fannie, Katie, and Edward Stewart,
Minors of J. R. Stewart, deceased.
J. T. TURNER.

165 GEORGIA, *Sumter County:*

This indenture, made and entered into this the eighteenth day of November, eighteen hundred and seventy, between William D. Stewart, administrator of the estate of James Stewart, late of Sumter County, deceased, of the one part, and Joseph T. Turner, in right of and for his wife, Martha F. Turner, of the other part, witnesseth: That whereas the said James Stewart departed this life in said county on the fourth day of February, eighteen hundred and seventy, leaving an estate consisting of lands, houses, tenements, rights, credits, personal property, and choses in action, also seven heirs at law him surviving; and whereas said heirs at law, all being present and of age, or represented by proper agents or guardians, did, on the sixteenth day of November, eighteen hundred and seventy, make and enter into a contract or agreement with the said William D. Stewart, administrator as aforesaid, to equitably divide the property of said estate into seven equal shares, and each heir to have and receive one share; and whereas, under said contract, the said heirs did, on the sixteenth day of November, eighteen hundred and seventy, proceed to divide said estate, and in said division the said Joseph T. Turner, in right of his wife, drew lot number five, consisting of the following property, to wit: One undivided half interest in the corner house known as the Masonic Lodge, and at present occupied by C. W. Felder & Son and by E. J. Mulkey and Will.
166 W. Palmer, in Lamar street; also, the "Our House," situated in said Lamar street, in the city of Americus; also, three (300) hundred acres, more or less, of land, situated in the district of Sumter County, and known as the "Home Place," number not now remembered, but adjoining the lands of Collins, Dorman, and Mann; also, five shares of the stock of the Southwestern Railroad, held for the purpose of carrying out and effectuating the true interests and purposes of said agreement for division of said estate and for the purpose of completing said division, the said William D. Stewart, administrator as aforesaid, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey, unto the said Joseph F. Turner, in right of and for his wife, Martha F. Turner, the following-described property, to wit: One undivided half interest in the corner house known as the Masonic Lodge, and at present occupied by C. W. Felder & Son and by E. J. Mulkey and Will. W. Palmer, in Lamar street; also, the "Our House," situated in said Lamar street, in the city of Americus; also, three hundred (300) acres, more or less, of land, situated in the district of Sumter County, and known as the Horn Place, number not now remembered, but adjoining the lands of Collins, Dorman, and Mann; also, five shares of the stock of the Southwestern Railroad, to have and hold the same forever in fee-simple.
167 In testimony whereof the said William D. Stewart, administrator of the estate of James Stewart, late of said county, deceased, has hereunto set his hand and seal this day and year first above written.

(Signed) W. D. STEWART. [L. S.]

Signed, sealed, and delivered in the presence of—
(Signed) W. A. HAWKINS,
(Signed) FRANK E. BURKE.

(Properly stamped and cancelled.)

GEORGIA, *Sumter County:*

Know all men by these presents that I, William C. Dodd, as principal, and , as security, acknowledge ourselves bound unto William D. Stewart, administrator of *of* the estate of James Stewart, late of said county, deceased, in the just and full sum of ten thousand dollars, for the true payment of which we bind ourselves, heirs, executors, and administrators, jointly and severally, firmly by these presents, signed, sealed, and dated this the 18th day of November, 1870.

The condition of the above bond is such that whereas under an agreement made and entered into by and between the said William D. Stewart, as administrator of the estate of James Stewart, deceased, and the heirs at law of said estate, (the said Dodd, in right of his wife, being one of the said heirs,) dated the 16th day of November, 1870, the
168 property of the said estate was divided by and between the parties, heirs of said estate, said division having been made on the 16th day of November, 1870, and in said division said Dodd, in right of his wife, drew property appraised at ten thousand two hundred and fifty dollars, besides one mule, estimated to be worth one hundred dollars, and the said property has been delivered into the possession of said Dodd, and titles thereto been made by said William D. Stewart, administrator as aforesaid:

Now, if the said William C. Dodd shall save the said William D. Stewart, administrator as aforesaid, harmless against the creditors of said estate, and shall contribute his pro rata proportion to any and all recoveries had against said estate, and promptly pay his equitable proportion of any and all legal expenses in the further and complete administration of said estate, then this bond to be void; otherwise of force and effect.

In presence of—

W. C. DODD. [L. S.]

(Properly stamped and cancelled.)

GEORGIA, *Sumter County:*

Know all men by these presents that I, Thomas H. Stewart, as principal, and , as security, acknowledge ourselves bound unto William D. Stewart, as administrator of the estate of James Stewart, late of said county, deceased, in the just and full some of ten
169 thousand dollars, for the true payment of which we bind ourselves, heirs, executors, and administrators, jointly and severally, firmly by these presents, signed, sealed, and dated this the 21st day of November, 1870.

The condition of the above bond is such, that whereas under an agreement made and entered into by and between the said William D. Stewart, as administrator of James Stewart, deceased, and the heirs at law of said estate, (the said Thomas H. Stewart being one of said heirs,) dated the 16th day of November, 1870, the property of said estate was divided by and between the parties, heirs of said estate, said division having been made on the 16th day of November, 1870, and in said divisions said Thomas H. Stewart drew property appraised at ten thousand two hundred and seventy-five dollars, besides one mule, estimated to be worth one hundred dollars, and the said property has been delivered into the possession of said Thomas H. Stewart, and titles thereto have been made by said William D. Stewart, administrator as aforesaid: Now, if the said Thomas H. Stewart shall save the said William D. Stewart, administrator aforesaid, harmless against the creditors of said

estate, and shall contribute his pro rata proportion to any and all recoveries had against said estate, and promptly pay his equitable pro-
170 portion of any and all legal expenses in the further and complete administration of said estate, then this bond to be void; otherwise of full force and effect. And for the purpose of security to said administrator, I hereby give to said William D. Stewart, administrator as aforesaid, a lien on the hotel house and lot in the city of Americus as collateral and as security on the above bond, and by this it is understood and agreed that said hotel house and lot shall be held and bound to said administrator as security to the above bond, with the right at any time to substitute personal or other security in lieu of said hotel.

(Signed) THOMAS H. STEWART. [L. S.]

Signed, sealed, and delivered in the presence of—
(Signed) W. A. HAWKINS,
(Signed) FRANK E. BURKE.

(Properly stamped and cancelled.)

171 *Testimony of Edward Houstoun.*

Interrogatories.

1st. State your recollection of the terms and conditions on which the defendant, A. S. Cutts, obtained control of the bonds of the Pensacola & Georgia Railroad Company about the year 1859–1860 or 1861, and state what year it was, as well as you remember.

2nd. State the number of bonds, the nominal value of each, and their actual market-value at the time Cutts got them.

3rd. Was Cutts a contractor on said road, for how much, and at what price?

4th. Were the bonds entrusted to him to enable him to realize money to carry out his contract; if not, for what purpose were they so entrusted?

5th. What security for their return did the company take? How much land, how many negroes, and how much and what railroad stock?

6th. Were these taken as collateral; when; and did you inform B. Mordecai that Cutts has no authority to sell the bonds, and when did you so inform him?

7th. State to the best of your recollection all about the contract of A. S. Cutts, the sale or loan of these bonds to him, the conditions and the number and value of the collaterals taken to secure the return of the bonds?

8th. When were the bonds returned and the collaterals restored
172 to Cutts? State particularly; and if you cannot remember the exact date, approximate as near as you can, and answer all the foregoing questions to the best of your recollection.

NISBETS & JACKSON,
Sols. for Complts.

Cross-interrogatories.

1st. If you say that A. S. Cutts was a contractor in constructing the Georgia & Pensacola Railroad, state whether he was not entitled to one hundred and ten thousand acres of land.

2nd. Had not the company of which you was president accepted an

order on Cutts in favor of Mordecai for fifty thousand acres of the land?

3rd. When in Savannah, in the year 1860, or about that time, before the war, did not the company buy all of Cutts' land at one dollar and twenty-five cents per acre, and in consummation of that contract did not you and Cutts go to Charleston and the company take up the order aforesaid, and did not the company give obligations to issue and deliver to him, Mordecai, the bonds hereto represented, and did not the company issue and deliver to Mordecai the said bonds as before indicated?

4th. Did not Cutts complete his contract with the company?

5th. Didn't you know that the original indebtedness of Cutts, represented by the order for fifty thousand acres of land, was for the in-
173 debtedness of Cutts for negroes, &c., used by him in the contract and from what you heard Mordecai say?

6th. What were these bonds worth in market in confederate money in 1863 and 1864? What are they worth now, and has there been any time since the war that they were of any value? Did Mordecai object to taking these bonds? Were they not delivered according to the contract by the company?

7th. In carrying out the contract aforesaid, did not the company assure or make a title to said lands to William Bailey and one McGhee, trustees, to enable them to issue said bonds as security for the same, which arrangement not only included the Cutts lands but all the other lands of the company?

8th. If the company afterwards dissented from any of the foregoing, state if such dissent was not after the acceptance of the first order, the organization of the trustees, the issuing and delivery of the bonds, and was it the fault of said Cutts?

W. A. HAWKINS,
Attys. for Defts.

(Exhibits—over.)

174 EXHIBIT.

Col. A. S. Cutts bought of B. Mordecai:

1863.		
Jany. 6.—To 220 Ga. & Pensacola 2.20 R. R. bonds, $5.00 each at 80 cts	88,000	00
To 220 coupons payable 1st July, 1861, $20.00	4,400	00
To interest on the same to 6th Jany., 1863	357	06
To 220 coupons, payable 1st July 1862, each $20.00	4,400	00
To interest on the same to 6th July, 1863	181	86
To 220 coupons, payable 1st July, 1863, each $20.00	4,400	00
To interest to 6th January, 1863	587	00
	106,679	19
Deduct cash	12,679	19
	94,000	00
Mortgage	44,000	00
	50,000	00

Answer to foregoing interrogatories:

And the said Edward Houstoun, being about the age of sixty-one years, and having been by me cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter in controversy, and true answers make to the interrogatories propounded by the solicitors for the complainants and defendants, did therefore depose, testify, and say as follows, to wit:

1st. To the first direct interrogatory the witness, answering, saith: About the year eighteen hundred and sixty, A. S. Cutts made application to the Pensacola & Georgia Railroad Company for assistance
175 to enable him to raise money to carry on his contract with the said company, and was loaned two hundred and twenty (220) secured-mortgage land-bonds, of five hundred ($500) dollars each, said bonds being a first lien on the lands of the company and a second lien on the road and equipment. To secure the return of said bonds, Cutts agreed that the company should hold as security the lands which he was to receive on the completion of his contract, about one hundred and ten thousand (110,000) acres; and he further agreed that the fifty thousand dollars ($50,000) stock which he was to receive upon the completion of his contract, and also thirty negro slaves, or thereabouts, should be held as a further and additional security for the return of the said bonds of the Pensacola and Georgia Railroad Company.

2d. To the second interrogatory (direct) the witness, answering, saith: There were two hundred and twenty (220) bonds, of the nominal value of five hundred dollars each, and the said bonds were of an uncertain value at the time they were delivered to Cutts—difficult to dispose of until the currency became very much depreciated.

3rd. To the third direct interrogatory the witness, answering, saith: Cutts was a contractor on the said railroad. He was contractor for about thirty-six miles, (36,) for excavations, superstructure, bridges, culverts, &c.; in fact, to complete the road ready for the rolling-
176 stock from Lake City westward to some distance beyond the Suwannee River. He was to receive one hundred and ten thousand acres of land, fifty thousand dollars of the capital stock of the said railroad, and fifty first-mortgage internal-improvement bonds, of one thousand dollars each, and after the completion of his contract and the return of the one hundred and ten thousand dollars of bonds, as aforesaid, a full settlement was made with him according to the terms of the contract.

4th. To the fourth direct interrogatory, witness, answering, saith: The bonds were loaned to Cutts to enable him to carry out his contract, and for no other purpose.

5th. To the fifth direct interrogatory, witness, answering, saith: That his answer to the first direct interrogatory answers all the points in this interrogatory.

6th. To the sixth direct interrogatory, witness, answering, saith: That the lands, the capital stock, and the negroes were taken as security for the return of the two hundred and twenty bonds of five hundred dollars each. Some time between the years 1861 and 1863—I cannot state positively—I informed Mordecai that Cutts had no authority to sell the bonds.

7th. To the seventh direct interrogatory, witness, answering, saith: The at this interrogatory are fully answered in the answers to the foregoing interrogatories, except as to the value of the collateral, the value of which this deponent cannot state.

8th. To the eighth direct interrogatory, witness, answering, saith: Witness cannot state positively when the bonds were returned to the
177 company by Cutts; but to the best of his recollection it was somewhere about the year 1863.

Answer to interrogatories by the defendant.

1st. To the first interrogatory by the defendant, witness, answering, saith: Cutts was entitled to one hundred and ten thousand (110,000) acres of land.

2d. To the second interrogatory by the defendant, witness, answering, saith: The company accepted an order of Cutts in favor of Mordecai for fifty thousand (50,000) acres of the land which Cutts was entitled to by virtue of his contract.

3rd. To the third interrogatory by the defendant, witness, answering, saith: Witness has no recollection of the company buying Cutts' land, or of going with him to Charleston to take up the order aforesaid, nor of the company's giving any obligation to issue and deliver to Mordecai the bonds heretofore represented, nor has he any recollection of the company issuing and delivering to Mordecai the said bonds.

4th. To the fourth interrogatory by the defendant, witness, answering, saith: That Cutts did complete his contract with the company.

5th. To the fifth interrogatory by the defendant, witness, answering, saith: That he does not know that the original indebtedness of
178 Cutts to Mordecai was for negroes used by him on the contract; but he knows that Cutts & Gilmer, the orginal contractors, purchased negroes of Mordecai about this time.

6th. To the sixth interrogatory by the defendant, witness, answering, saith: That the bonds referred to in this interrogatory were worth in 1863 and in 1864 from sixty to eighty cents on the dollar confederate money. At the present time they can be purchased at ten cents on the dollar. I know of no sales for money made since the war having been effected on the said bonds. The company had no transactions with Mordecai respecting the said two hundred and twenty bonds of five hundred dollars each.

7th. To the seventh interrogatory by defendant, witness, answering, saith: There never was any contract between Cutts and the company for the purchase of his lands, neither did the company agree to issue and deliver to Mordecai the bonds hitherto represented, nor did they deliver to Mordecai any of the said bonds, but the bonds were delivered to Cutts as before stated. Messrs. Bailey & McGhee were made trustees for the company in issuing the said secured mortgage land-bonds, both the 220 bonds delivered to Cutts and others of the same character. The land conveyed to Bailey & McGhee did not include the lands of Cutts.

8th. To the eighth interrogatory by defendant, witness, answer-
179 ing, saith: As there was no contract made with Cutts for the purchase of his lands and to issue bonds on them, there could be no dissent.

E. HOUSTOUN.

Sworn to and subscribed before me this 27th February, 1872.
[SEAL.] JAS. McPHERSON, *Clerk.*

180 *Affidavit of A. S. Cutts.*

Allen S. Cutts, one of the defendants in this cause, on oath says that he and one Gilmore, then in life, now deceased, were employed by the

Georgia & Pensacola Railroad Company as contractors in the construction of that road, and commenced their operations as copartners in the contract some time in the year 1857 or 1858, and which was continued by this firm and by this deponent, after the dissolution of that partnership, from that time up to about the commencement of the late confederate war, in the year 1861. A large part of the compensation agreed to be paid for their work on said road was by the terms of their contract with said company to be paid in lands of the company lying along the line of the road.

Very soon after making that contract and the commencement deponent and his partner, Gilmore, commenced buying negroes from Benjamin Mordecai, a negro trader and speculator, residing in Charleston, in the State of South Carolina, giving to the said Mordecai the notes of Cutts & Gilmore, (deponent and his partner,) secured by a mortgage on the negroes purchased. Their purchase commenced in the latter part of the year 1857 or first of the year 1858, and continued until they had purchased from 35 to 40 negroes, for which they had agreed to pay some 30 or $40,000, for all of which the said Mordecai held the notes of said Cutts & Gilmore, secured as aforesaid. Deponent and his part-
181 ner were unable to pay these debts as they fell due, and they had to extend them from time to time at most exorbitant usurious rates of interest, which was added to the original purchase-price agreed on, until the debt amounted in 1860 or '61 to over sixty thousand dollars. This sum was increased to this amount by some small advances in money that said Mordecai had during the time made to said Cutts & Gilmore, to assist them in their enterprise, and for which high rates of interest and commissions were charged. This debt was all secured by mortgage on the negroes purchased from Mordecai by this partnership, and who were employed as laborers or hands in the construction of the road. It was further secured by a draft drawn by deponent or deponent and his partner on said railroad company in favor of said Mordecai for fifty thousand acres of land, to which they were entitled under their contract for work done on the road, which order had been accepted by the company and was held by said Mordecai as collateral security, solely for the payment of said debt of Cutts & Gilmore, executed as before stated.

In the course of the years 1860 or 1861, this debt still existing, secured as aforesaid, Colonel Houstoun, then of the State of Florida, and then the president of said railroad company, determined that all of the lands of the company should be conveyed to trustees as security for bonds of the company to be issued by said trustees and negotiated to aid in
182 the completion or extension of the road, pay its debts, &c., and he proposed to deponent, who had in the mean time bought out his partner, Gilmore, and assumed all the debts of the firm, that if he would put into this scheme his lands, those to which he was entitled under the contract, the company would take them at one dollar and twenty-five cents per acre—he might do so and they would give the said bonds of said company so to be issued as aforesaid in lieu of said lands, to whatever sum they might amount to at that price, to which deponent assented; but as Mordecai held 50,000 acres of the land it was necessary to consult him and obtain his consent. For this purpose the defendant and Colonel Houstoun visited Mr. Mordecai at his office in Charleston, and they then proposed to him to give up his accepted order for lands so held by him as aforesaid, the mortgage he held on the negroes as aforesaid, and to take the said bonds of the company as collateral for the said debt. Mordecai consented to this, but required one hundred

and ten thousand dollars' worth of the said bonds to be delivered to him for that purpose, but as that was a larger amount than deponent was entitled to at the time, his contract not being quite finished, Colonel Houstoun, as the president of the company, required a transfer of Mordecai's mortgage to him on the negroes until the contract was finished, when deponent would be entitled to that amount of said bonds—
183 all of which was agreed to by all the parties—Mordecai, deponent, and Houstoun. The bonds were issued and delivered to Mordecai, the mortgage transferred to the company, Mordecai still holding his said debt so created as aforesaid and the bonds of the company to the amount of $110,000 as collateral security for the debt so held by him as aforesaid, which was the debt as originally contracted of Cutts & Gilmore, then of deponent by assumption, but one in which James Stewart had no interest, and for which he was in no wise liable in any way whatever. Some time after this transaction the said Mordecai became anxious to realize on his debt or close it out, and he sent for deponent to visit him at Charleston, to make arrangements for that purpose, and he then notified deponent that he must pay the debt or he should sell the bonds of the Georgia & Pensacola Railroad Company so held by him as collateral security. Deponent then proposed to sell the bonds to Mordecai, and he consented to buy them, and after ascertaining the market-value of the bonds in Charleston at that time, which was in the year 1860 or 1861, did buy them at sixty cents on the dollar, which was then understood by deponent and Mordecai as the full market-value of them, and deponent realized from the sale the sum of sixty-six thousand dollars, ($66,000,) which
184 then fully covered the whole amount of the debts given by Cutts & Gilmore for the purchase of negroes as aforesaid, the large amount of usurious interest charged by said Mordecai for their extension to that time, the small cash-advances or loans made to that firm, with interest and commissions on them, and the whole amount of said debts were fully paid off and discharged to the said Mordecai from the proceeds of the sale of said bonds, the debts extinguished, and the evidences thereof held by said Mordecai given up and cancelled.

Some time after this, and perhaps in the year 1862, after deponent's contract was fully completed and he became entitled to have the mortgage on his negroes given up and cancelled, and when he desired to remove them to his home in the State of Georgia, he learned to his surprise that the railroad-company had determined not to pay said bonds or the coupons due on them, nor to deliver up to deponent his negroes until the bonds which had been issued to him were returned and cancelled, and for this purpose sued out some process in the courts of Florida under which the negroes were seized and placed in the hands of a receiver. At this time the war was going on and deponent in its service, and it was not possible for him to give his attention to this litigation, and, as he was greatly embarrassed at the time and anxious
185 to get possession of the negroes, put his business in a better condition, and avoid a litigation that threatened to be very embarrassing, he determined to purchase back the bonds from Mordecai if he could, although he was under no legal or moral obligation to do so, as the bonds had been legally issued, fully and fairly negotiated to a bona fide purchaser, with a full approval and consent of the president of the company, and the failure of the company to pay said bonds, or the accruing interest thereon, the seizure of deponent's negroes, and the requisition on him to repurchase and return the bonds were all wrong, unjust, and illegal acts, and impositions of said railroad company, justified by

no act, fault, or default of deponent, and which could not have been justified or sustained by any court possessed of the fact.

This deponent then opened negotiations with said Mordecai for the purchase of said bonds, although he, the said Mordecai, had no claims on him whatever requiring such purchase, and he proposed to said Mordecai to buy said bonds, to pay him in the note of James Stewart for the sum of forty-four thousand dollars, secured by mortgage—to give Mordecai his own note for fifty thousand dollars, to be secured by an order on the Georgia and Pensacola Railroad for fifty thousand (50,000) acres of land, accepted by that company, and the balance, if any, to be paid in cash. On this proposed basis of payment, Mordecai
186 consented to make the sale, deponent to pay him for the bonds eighty cents on the dollar of principal, the full amount of the coupons due, and all interest in the coupons to the date of trade, which was accepted and consummated on the 6' day of January, 1863, and the purchase amounted to the sum of one hundred and six thousand six hundred and seventy-nine dollars and nineteen cents, ($106,679.19,) which was the then full market-value of said bonds in confederate currency, the basis on which said trade was made, and the said purchase-price so agreed on had reference solely to the confederate value of said bonds at the time, and no connection with any debt then existing to the said Mordecai by deponent or any one else. Of this amount deponent paid to said Mordecai at the time twelve thousand six hundred and seventy-nine dollars and nineteen cents ($12,679.19) in confederate currency, the only one contemplated in which payment for said purchase was to be made or was intended or expected by either of the parties thereto.

And for a further part payment of said purchase deponent gave to said Mordecai his individual promissory note for fifty thousand dollars, due at one day after its date, and an order for 5,000 acres of land, to be held by said Mordecai as collateral security for the payment of his said individual note of $50,000, given at that time, and for the balance
187 of the said purchase-price of said bonds deponent gave to said Mordecai the note of James Stewart for $44,000, dated of that date, 6 January, 1863, and due at 12 months from its date, payable to order of and endorsed by deponent to said Mordecai. This note was also secured by the mortgage set out in complainant's bill, and which form a part of the subject of this litigation. On the consummation of this purchase, said Mordecai directed the bonds which were on deposit in bank to be delivered to the president of said railroad on the acceptance of the order for the 50,000 acres of land or a conveyance thereof to him.

The railroad company having agreed before this to cancel the conveyance to it by deponent of his lands, its deed of the same lands to trustees for security of these bonds, all of which had been done whenever deponent should return or deliver back said bonds so paid to him, as before stated.

The note of said James Stewart for the said $44,000 given to said Mordecai as a part payment of the purchase of said bonds was his the said Stewart's first and only connection with this transaction, and was an accommodation-note made and given by said Stewart to deponent as a matter of favor to enable him to effect this negotiation, and for no other purpose.

After this transaction was fully consummated, the railroad company cancelled the mortgage on deponent's negroes, restored the
188 possession of them to him, and conveyed to him all the lands to

which he was entitled, although the said Mordecai had no interest in them, except in this, that the lands of deponent, as well as *all* of the company, were held in trust for the security of his and all other issue of like bonds.

In two or three months, or a very short time after deponent's purchase of these bonds from Mordecai, he tendered and paid to Mordecai, in confederate treasury notes, the $50,000 note so given to him as aforesaid, which was accepted as full and complete payment of the same, and in compliance with his purchase. And afterwards, during the year 1863, while deponent was absent from home in Virginia and in the army, said Mordecai, before the note of Stewart fell due, frequently, and at different times, wrote to him urging him to make sale of his negroes and to pay off this note and mortgage of Stewart for $44,000, the said Mordecai contemplating that if such sales were made the confederate currency could be realized and the debt paid off with it; and if deponent could have been permitted to return to his home and make such sales, as Mordecai suggested and urged him to do and as he intended and greatly desired, the debt would have been paid off in confederate currency by the time the notes became due, and long before; but
189 after the debt had become due, and deponent was enabled to come home, some time in February or March of 1864, he visited Mordecai in Columbia, South Carolina, and then offered to pay him the amount due on said note in confederate treasury notes, and it was refused by said Mordecai on account of its then greatly depreciated condition.

It is true that, besides the debts heretofore referred in this affidavit the said Mordecai held and controlled other debts of deponent, to wit, the debts referred to in the affidavits of James T. Nisbets and said Benjamin Mordecai, of file in this case, to wit, the note of about $20,000 on deponent, secured by the acceptances of Cutts & Johnson, and Jas. Stewart's draft for $15,000; but this debt did not belong to said Mordecai, but to one Savage, then of the State of Florida, a co-contractor with deponent on the Georgia & Pensacola Railroad, and to whom deponent was indebted in this sum, and who had deposited these papers with Mordecai for collection, and which deponent had, while Mordecai so held them, paid to said Savage, and Savage had given to deponent a receipt against them and an order on Mordecai for the papers, which Mordecai did subsequently deliver to deponent, as directed by Savage.

Mordecai also held three notes on James Stewart, given some time in 1860 to deponent for ten thousand dollars each. These were as collateral security for a debt of about 27 or $28,000, due by depo-
190 nent to said Mordecai for the purchase of negroes on his individual account during the year 1860; but these debts had not the slightest connection with the debts created by Cutts & Gilmore for the purchase of negroes referred to in the preceding part of this deposition, nor were they in anywise connected with the debts settled from the sale of Georgia & Pensacola bonds, but was contracted and created at a different time and for different consideration, and not included in or alluded to in any of the settlements or transactions hereinafter alluded to.

The said Mordecai also held and controlled a debt in favor of the Southwestern Railroad Bank of the State of South Carolina, for some 7 or $8,000, which he, Mordecai, had bought up in 1864 with confederate treasury notes. This latter note, with the one given to him by deponent in 1860, on which was due some 27 or $28,000, secured by the three notes on James Stewart for ten thousand dollars each, Mordecai retained until after the war, and then presented them in 1866 to deponent

for arrangement and settlement, and deponent refused to pay the one debt, not on account of commissions, as stated in Mordecai's affidavit, but because of its being for a slave consideration, and the other because of its being payable to the bank, and deponent's right, as he stated, to pay it in the bills of that bank, which was at an insignificant value. But for the sake of a settlement without litigation he agreed to allow Mordecai on them and in compromise of them the sum of $14,833.30, if he would take of deponent 12,000 acres of his Florida lands at two
191 dollars and fifty cents per acre, or $30,000, to which the said Mordecai consented, and deponent conveyed to him the 12,000 acres of land, and Mordecai gave up the said notes and satisfied said debts, and credited the balance of said $30,000 agreed to be paid for said lands, to wit, the sum of 15,325.00, on the Stewart note and mortgage for $44,000.

It is not true, as stated in the affidavit of Mordecai, that the Georgia & Pensacola Railroad bonds were loaned to him, but they were given to him by the president of the road for his lands, with no expectation or intention on the part of any of the parties that they should be returned. It is not true that the railroad company held those lands, to which deponent was entitled for his work on the road, nor the 35 or 40 negroes of deponent, nor 50,000 of the stock of deponent as collateral security for the return of the bonds to the company. The lands had been sold by deponent to the company, and these bonds taken in lieu of them, and the lands conveyed by the company to trustees. It is true that the company did hold the transfer from Mordecai of the mortgage on the negroes of deponent, not as collateral security for the return of the bonds, but for the completion of deponent's contract for work on the railroad.

The bonds of the Georgia and Pensacola Railroad Company are not comparatively valueless, and have been since the close of the war worth not more than ten cents, or other small sum, on the dollar.

192 Deponent further adds, by way of explanation, that he has stated heretofore under oath that he sold the Georgia & Pensacola Railroad bonds to Mordecai at seventy cents on the dollar, and in the deposition at sixty cents on the dollar. When he made the first statement his recollection was that he had sold them at that sum, but since making that statement his recollection has been corrected and freshened by reference to answer of Mordecai and other data to which he did not have access when his first statement was made, and he can and does now state that the sale was at sixty cents on the dollar, as stated by Mordecai, and not at seventy, as he first stated it himself.

Deponent has been at great loss in making out a complete history of this transaction, on account of the loss of all his accounts, statements, settlements, cancelled notes, and letters relating to this and a great many other important transaction', that occurred by the burning of his office, and destruction at the time of all those papers, during the late war.

A. S. CUTTS.

GEORGIA, *Sumter County:*

Personally appeared Allen S. Cutts, who, being duly sworn, deposeth and saith that the facts and statements set forth and contained in the foregoing deposition are true in substance and in fact.

A. S. CUTTS.

Sworn to & subscribed before me this the 16th April, 1872.

J. M. CLARK,
J. S. C. S. W. C.

193 Endorsement to Cutts' affidavit:

In fifth circuit court for southern dist. of Geo. Salamon Root & Co. vs. W. D. Stewart, admr., et al. Affidavit of Allen S. Cutts. Hawkins, Lyon.

194 *Testimony of Sidney Root.*

Interrogatories for Sidney Root, of New York, one of the complainants, who resides in the city and State of New York.

Interrogatory 1st. Please append a copy of your contract with B. Mordecai to your answer to this question. Please state also in whose possession the original is.

Interrogatory 2d. Please say whether you have realized anything from the securities therein mentioned; if yea, precisely how much from each and what the condition of the balance of said securities is as to solvency or probability of realizing thereon.

Interrogatory 3rd. Please state all you know going to cast light upon the indebtedness of Mordecai to you and the precise amount now due to you from the papers you hold against him secured by the transfer of the rights of Mordecai in the mortgage on Stewart, the subject-matter of this litigation, and all you know entitling you to a recovery in this suit, and for how much.

JACKSON, NISBET & BACON,
Sols. for Complainants.

(Endorsement:)

We agree that William Harden execute the within interrogatories 24th Novr., 1873.

JAMES JACKSON, *Sol. for Complt.*
R. F. LYON, *For Defts.*

In fifth circuit court of the United States for the southern district of Georgia. In equity. Salamon Root & Co. vs. Allen S. Cutts et al. Interrogatories for Sidney Root. Novr. 12th, 1873, served copy on Messrs. Lyon & Irwin, Jackson, Nisbet & Bacon, sols.

195 Answer to foregoing interrogatories.

And the said Sidney Root being about the age of forty-seven years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Sidney Root, and he did thereupon depose, testify, and say as follows, viz:

To the first interrogatory he answers and says the original contract is in the possession of deponent and is hereto appended.

To the second interrogatory he answers and says deponent has never realized anything from the securities therein mentioned and believes them to be utterly worthless.

To the third interrogatory he answers that the indebtedness of said Mordecai to the concern of Salamon Root and Company was for cash advanced, upon which certain amounts were collected from other sources than the securities mentioned in said assignment, so that on the third day of October, eighteen hundred and seventy, the actual indebtedness of said Mordecai was thirty thousand and forty-seven dollars and seventy-six cents, ($30,047.76,) since which date the sum of nine hundred

and one dollars and forty-three cents ($901.43) was received on January 5th, eighteen hundred and seventy-two, and the further sum of two hundred and forty dollars and thirty-eight cents ($240.38) on the 22d April, 1872, from the assignee in bankruptcy of said Mordecai, and the
196 said amount of $30,047.76, after deducting said amounts of $901.43 and $240.38, is due with interest from October 3rd, 1870.

SIDNEY ROOT.

Sworn to and subscribed before me this 28th Novr., 1873.

WM. HARDEN,
Commissioner by Consent.

Contract of Mordecai and Salamon Root and Co.

CITY OF NEW YORK,
County of New York, State of New York:

The undersigned being indebted to Messrs. Salamon Root & Co., (in liquidation,) of New York, in the sum of $23,454\frac{45}{100}$, which debt was and is recognized and secured by a mortgage, dated and recorded April 26th, 1867, on three (3) lots of land in Charleston, S. C., by the terms of which mortgage said debt was made due on the 26th of April, 1868, with interest at 7% from the time said debt became due:

Now, for and in consideration of the sum of ten dollars, in hand paid, the receipt of which is hereby acknowledged, and for the further securing of said debt, and also to secure said Salamon Root & Co. against loss in case Joseph Purcell and Gabriel Davis shall fail to pay a certain promissory note dated Charleston, S. C., Nov. 1st, 1866, and due with interest from date on the 1st day of November, 1867, for the sum of ten thousand dollars, ($10,000,) upon which I am endorser and which
197 has been paid to Salamon Root & Co., I hereby transfer and assign to said Salamon Root & Co., (in liquidation,) or order, all of a certain claim of mine on A. S. Cutts and James Stewart, of Sumter County, Georgia, which claim or debt is secured by mortgage on certain real estate in Americus, Sumpter County, Georgia, and now in the hands of Mess. Nisbet, of Macon, Georgia, for collection, I advising and assisting in said collection.

BENJAMIN MORDECAI.

Signed and sealed this 10th day of August, 1867, in presence of—
LOUIS DE SAULLES, JR.

No compromise of the above case to be made without conferring with Mr. Mordecai.

SALAMON ROOT & CO.,
In Liquidation.

Endorsement on contract:
B. Mordecai. Transfer of claim on Cutts & Stewart, August 10th, 1867.

Endorsement on deposition:
United States circuit court for southern district of Georgia. Salamon Root & Co., complts., and Allen S. Cutts et al., defendants. In equity. Deposition on the part of the complainant taken before William Harden, commissioner by consent, on the 28th day of November, 1873. Received at hand of William Harden, com., & filed Nov. 28th, 1873.

JAS. McPHERSON, *Clerk.*

198 *Order overruling motion to dismiss bill, &c.*

The defendants, by their counsel, came and moved to dismiss the proceedings in the above stated cause on the ground that the cases of Mordecai vs. Cutts, to which the above bill is ancillary, were improperly and illegally removed to this court from the superior court of the county of Sumter. Whereupon, after argument had, it is ordered that said motion to dismiss be overruled, and the said cause proceed.

W. B. WOODS, *Judge.*

(Endorsement:) U. S. cir. court, so. dist. of Ga. In equity. Salamon Root & Co., complts., vs. A. S. Cutts, et al., defendants. Order overruling motion to dismiss bill for want of jurisdiction, &c. Filed May 9, 1873. Jas. McPherson, clerk. Nisbets & J. & Poe & Hall.

Affidavit of A. S. Cutts, No. 2.

In reviewing the statements of E. Houstoun, esq., late president of the Pensacola & Georgia Railroad Company, in answer to certain questions propounded to him by solicitors of plff. and defendt. in this cause, I beg leave to say that I find so many errors that I prefer making a full statement of facts in this connection, and making them more full than in a former statement or affidavit. Mr. E. Houstoun is in error when
199 he says the railroad company made no contract with myself for the purpose of my Florida or railroad land, and which was to be paid for in bonds of said co. The facts are as follows: I met Col. E. Houstoun, president of the Pensacola & Georgia Railroad Co., in Savannah, Ga. I had known that this railroad co. had been hard pressed for means to pay its own liabilities, and having asked of said company on one occasion a small loan, some two thousand dollars, in their railroad change bills, and being refused, I had no thought of applying to said co. for any accommodations whatever, nor did I believe them able to grant any if disposed to do so. Hence when I met Col. Houstoun, president of said co., in Savannah, Ga., as before mentioned, I was greatly surprised when he said the railroad co. would buy my land and pay me for the same in land-bonds, as they were called by him. I had never heard or even thought of such bonds being issued, and even if I had I should not have asked the loan of so large am't of bonds, and that from a company greatly embarrassed itself, and one that had never shown any disposition to assist me, even if they could, but had on the contrary withheld sums of money that I was justly entitled to.

When Mr. Houstoun made me this proposition to pay me in bonds at the market-price, I said "This is equal to cash; I accept your proposition." We went in company to Charleston, S. C., and in Mr. B. Mordecai's
200 office, he, Mr. E. Houstoun, president, &c., gave Mr. B. Mordecai an obligation to deliver to him the 220 bonds in question so as to secure the return of his own obligation as president of the P. & G. Railroad Co. for 5[illegible],000 acres of Florida and railroad land, as it was called, owned by me, which was held by Mr. B. Mordecai as security to my &c. Mr. E. Houstoun then, for the first time, said this amt. bonds is a large advance on the purchase of your land, as your contract is not yet completed; and until it is we do not owe you the whole of the 110,000 acres of land, and asked that the mortgage on my negroes held by Mordecai be transferred to the P. & G. Railroad Co., as a guaranty that my contract should be completed, to which I consented. Mr. Houstoun says that he did not deliver the bonds in question to Mordecai, but to myself. In this he is mistaken, as the bonds were not printed at the time we

made the trade and Mr. Houstoun gave his obligation as president, &c., to deliver the 220 bonds to him, Mordecai, so soon as they could be printed and filled up, which he did after some two months' delay. I say most positively that I never saw or held in my own hand any of these bonds even up to this date. I sold them to Mordecai without seeing them, as they were in bank. I bo't them back and an order from Mordecai was given to Mr. Houstoun on the bank for the bonds. So I never saw them. I do not believe the delivery of these bonds at the time afforded me any relief or gave me any money at all, as it was simply
201 an exchange of collaterals with Mr. Mordecai, which I was not compelled to do, and which I certainly would not have done had the bonds been only loaned to me as stated by Col. E. Houstoun, for as a loan it is very plain to be seen it did me no good and complicated my whole assets and rendered settlements more difficut, but as a sale of land and a purchase of bonds they could be sold more readier (?) that (?) the land and would enable me to relieve myself by pay (?) up my debts, which was the only object at the time, and if the bonds had been printed and filled up they would have been sold at once while Mr. Houstoun was present and the debt paid. I often met Col. Houstoun pending the issuing of these bonds, and after he had delivered to *to* Mordecai he gave me no notice that the company had declined to take the land and pay the balance of the bonds when my contract was completed, nor did he do so until after I had sold the bonds to Mordecai, and not then until the beginning of the late war had rendered it impossible to enforce contracts by the courts of the country, and when financial affairs was so disarranged and nothing could be done in business matters. Then Col. Houstoun said the directors had refused to buy or take the land, and when I urged the fulfillment of the contract on his part he further said he was in favor of carrying it out himself, but his acts as president did not bind the railroad company. Then *then* (?) seized my negroes and had them in the hands of a receiver. They thus held my whole assets.
202 There being at the time no chance for this contract, as we had no courts, I, as soon as possible, purchased the bonds and returned them to the railroad co. Col. Houstoun is again mistaken when he says the whole of the railroad stock to which I was entitled was pledged to the railroad co., amounting to 50,000 in stock. No mention was made of the stock at any time between Col. Houstoun and myself. Could not have been transferred to said co., for over 30,000 of said stock was held by Mess. Brigham, Baldwin & Co., and Tison & Gordon, of Savannah, Ga., as collateral to many loans to Cutts & Gilmer, the old firm.

A. S. CUTTS.

Sworn to and subscribed before me this May 10th, 1873.

JAS. McPHERSON, *Clerk.*

(Endorsement:) In fifth circuit court United States for the southern dist. of Ga. Salamon Root & Co. vs. W. D. Stewart et al. Affidavit of A. S. Cutts. Hawkins, Lyon.

203 UNITED STATES OF AMERICA,
Southern District of Georgia, ss:

At a stated term of the fifth circuit court of the United States of America for the southern district of Georgia, held at the United States court-rooms in the city of Savannah, in and for the said district, on the twelfth day of May, in the year of our Lord one thousand eight hundred and seventy-three.

Present, the honorable William B. Woods, U. S. judge for the fifth judicial circuit.

SALAMON ROOT AND CO.
vs.
ALLEN S. CUTTS ET AL. } In equity.

Order to make assignee of Mordecai party, &c.

It appearing to the court that J. E. Burke, the assignee in bankruptcy of Benjamin Mordecai, has not been served with process in this cause, it is ordered that a subpœna be served upon him, and that he answer the bill above stated within two months from the adjournment of this court, and, in the event of his failure to answer, that the same be taken pro confesso as against him.

It is further ordered, by consent of parties, that the depositions of Benjamin Mordecai, James T. Nisbet, Edward Houstoun, Allen S. Cutts, and all other depositions heretofore taken and used before Judge Erskine on the motion to appoint a receiver be used on the hearing of this cause on the merits at the next term, and that each party
204 have leave to take further testimony by serving the other party with ten days' notice of the name of the witness and the questions to be propounded, and that the said bill be set for trial on the 28th day of November, 1873, during the next term of this court, and that all parties interested in the above-stated bill and the causes antecedent thereto and connected therewith, removed from the superior court of Sumter County, be required then and there to litigate their respective rights.

W. B. WOODS,
Judge.

(Endorsement:) U. S. cirt. court, so. dist. of Georgia. In equity. Salamon Root & Co., complts., vs. Allen S. Cutts et al., defendts. Order for service of spa. on J. E. Burke, assignee of B. Mordecai, bankrupt, to make him a party defendt.; also for consent as to testimony on file and to take testimony and for a hearing. Filed May 12th, 1873. Jas. McPherson, clerk. Consent.

Answer of J. E. Burke, assignee.

To the judges of the fifth circuit court of the United States for the southern district of Georgia:

James E. Burke, one of the defendants, as the assignee in bankruptcy of Benjamin Mordecai in the above-entitled cause, for answer to complainants' bill of complaint, or to so much and such parts thereof as this defendant is advised it is material or necessary for him to make answer unto, answering, says:

205 That on the third day of October, A. D. 1870, he was chosen as the assignee in bankruptcy of Benjamin Mordecai, a bankrupt, at Charleston, in the State of South Carolina, and entered upon the duties of his office, and is now such assignee.

That in the schedule of the creditors of the said bankrupt holding securities there is an entry as follows:

"Names of creditors: Salamon Root & Co.,

"Residence & occupation: No. 3 Park Place; merchant, of New York.

"When & where contracted: 1865 & 1866; in New York.

"Value of securities: 62,633 dollars.

"Amount of debts: 28,300 dollars.

"Particulars: Note of B. Mordecai to Salamon Root & Co., made

son and Company, opposite and east of the south end of John V. Price's fire-proof warehouse; also, the two-story brick house on the east side of Johnson street, and south of the last-mentioned premises, then occupied by John W. Wheatley and Robert T. Byrd, together with the respective lots of ground belonging and appertaining to the town-
211 lots upon which they are situated; also, the undivided half-interest in the two-story brick store-house, known as the Masonic Hall, on south side Lamar street, next west of Dr. H. C. Bailey's confectionery; also, the two-story brick store-house situate on south side of Lamar street, next east of Dr. H. C. Bailey's store, formerly occupied by Kapp and Dann, together with all and singular the rights, members, and appurtenances to said houses and lots belonging, with the rents, issues, and profits thereof, be forever barred and foreclosed; and that said premises be sold by the marshal under the rules governing his sales of land to satisfy said debt due upon said bond and mortgage; and that any balance of said debt over and above the proceeds of such sale may be collected by execution in favor of complainants against the said William D. Stewart, administrator of said James Stewart, deceased, as principal debtor, to be levied of the property of said deceased in his hands to be administered, and against the said Allen S. Cutts, as indorser; and that the said administrator and the said indorser pay the costs of this bill and of the three causes between Benjamin Mordecai and said Stewart and Cutts transferred to this court from the superior court of Sumter County, Georgia, this decree disposing of said causes.

In the event that the claims of complainants against Benjamin
212 Mordecai, to secure which the debt herein described was transferred to said complainants, shall be satisfied without exhausting the amount of this decree, leave is reserved to the assignee in bankruptcy of said Mordecai, or to any one lawfully succeeding to his rights, to move in this court to have the excess paid to him.

Done in open court this 15th day of December, 1873.

W. B. WOODS, *Judge.*

(Endorsement:) U. S. cir. court, so. dist. of Ga. In equity. Salamon, Root & Co., complts., vs. Allen S. Cutts et al., defendants. Final decree. Filed Dec. 15, 1873. Jas. McPherson, clerk. Jackson, Nisbet & B. A. T. Akerman, for compts.

Order allowing appeal to supreme court.

A decree having been rendered in said cause in favor of complainants, and defendants being dissatisfied therewith and praying an appeal of said cause to the Supreme Court of the United States, the same is accordingly allowed.

And it is ordered that they give the bond required by law in cases of appeal in the sum of two thousand dollars.

W. B. WOODS, *Judge.*

DEC. 25, 1873.

213 (Endorsement:) U. S. cir. court, so. dist. of Georgia. In equity. Salamon, Root & Co., complts., vs. Allen S. Cutts et al., defts. Order allowing petition to be filed for appeal and for bond for $2,000. Filed Dec. 15, 1873. Jas. McPherson, clerk. Jackson, Nisbet, & B. A. T. Akerman, sols.

Appeal-bond.

Know all men by these presents that we, William D. Stewart, administrator of the estate of James Stewart, deceased, as principal, and

Thomas H. Stewart and J. T. Turner as sureties, are held and firmly bound unto Ezekiel Salamon, Sidney Root, John N. Beach, and Edward W. Marshall, partners under the name of Salamon, Root & Co., in the full and just sum of two thousand dollars, to be paid to the said Ezekiel Salamon, Sidney Root, John N. Beach, and Edward W. Marshall, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this fourth day of February, in the year of our Lord one thousand eight hundred and seventy-four.

214 Whereas lately, at a term of the circuit court of the United States for the southern district of Georgia, in a suit depending in said court between the said Salamon, Root, and others named with them, as complainants, and the said William D. Stewart, as administrator, and Allen S. Cutts, as defendants, a decree was rendered against the said defendants on the 15th day of December, A. D. 1873, and the said defendants, on the same day, in open court, prayed an appeal in the said cause to the Supreme Court of the United States, to reverse the said decree, which was then and there, by order of the said circuit court, allowed, and by the same order it was directed that the said defendant give the bond required by law in cases of appeal, in the sum of two thousand dollars:

Now the condition of the above obligation is such that, if the said appellants shall prosecute said appeal to effect and answer all damage and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

W. D. STEWART, *Admr.* [L. S.]
THOS. H. STEWART. [L. S.]
J. T. TURNER. [L. S.]

Signed, sealed, and delivered in presence of—
[SEAL.] M. SPEER, *Not. Pub.*

(Endorsement:) Allen S. Cutts et al., appellants, vs. Salamon, Root & Co., appellees. Appeal-bond. Filed Feb'y 6th, 1874. Jas. McPherson, clerk.

215 *Justification of sureties on appeal-bond.*

In circuit court of the U. S. for the southern dist. of Georgia.

IN THE MATTER OF SIDNEY ROOT & CO.
vs.
A. S. CUTTS ET AL.

SOUTHERN DISTRICT OF GEORGIA,
County of Sumter, ss:

In person appears before me, M. Speer, a notary public in and for the county of Sumter and State of Georgia, duly commissioned, J. T. Turner, who, after being duly sworn, deposeth and saith that he is a citizen of the southern district of Georgia, residing in the county of Sumter, and owns the following-described real estate, viz: One plantation containing three hundred and fifty acres of land, situate in the 27th district of Sumter County, five miles east of Americus, and known as the Horn Place, and a plantation containing four hundred acres, more or less, being lots numbers two hundred and thirty-four (234) in 29th dist. of Schley County and (214) two hundred and fourteen in 29th dist. of Sumter County; house and lot in city of Americus, on Troupe street, known as the house and lot occupied by deponent from the commencement of 1868 to the close of 1871, now occupied by H. L. French, con-

taining 6 or 8 acres; store-house on Lamar street, occupied by J. T. Hudson, said store-house being in said city of Americus; plantation
216 in Quitman County, Georgia, containing (1,040) one thousand and forty acres, known as the Turner Place, and having been in possession of deponent for last twenty years; and other property too tedious to mention; which property is worth more than four thousand dollars over deponent's liabilities and exemptions allowed by law.

J. T. TURNER.

Sworn to & subscribed before me this the 14th day of February, A. D. 1874.

[SEAL.] M. SPEER, *Not. Pub.*

SOUTHERN DISTRICT OF GEORGIA,
County of Sumter, ss:

In person appears before me, M. Speer, a notary public in and for the county of Sumter and State of Georgia, duly commissioned, Thomas H. Stewart, who, after being duly sworn, deposeth and saith that he is a citizen of the southern district of Georgia, residing in the county of Sumter, and owns the following-described real estate, viz: Plantation in 27th district Sumter County, four miles southwest of Americus, being the place whereon deponent now lives, and containing two hundred acres, more or less; also house and lot on Troupe street, in the city of Americus, being the house lately occupied by M. E. Flesh, lot containing one acre, more or less; and one lot, with building thereon, situated on southwest corner of public square in city of Americus, containing one acre, more or less, fronting one hundred and eighty (180) feet on Lamar
217 street and running back (270) two hundred and seventy feet on College street, which property is worth more than four thousand dollars over deponent's liabilities and exemptions allowed by law.

THOS. H. STEWART.

Sworn to and subscribed before me this 4th day of February, A. D. 1874.

[SEAL.] M. SPEER, *Not. Pub.*

218 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Southern District of Georgia:

I, James McPherson, clerk of the fifth circuit court of the United States for the southern district of Georgia, do hereby certify that the foregoing papers are true copies of their respective originals on file and remaining of record in my office, and that they form a full and complete exemplification of all the proceeding' in a suit wherein Salamon Root and Company are complainants and Allen S. Cutts and others are defendants in this court.

In witness whereof I have hereunto set my hand and affixed the seal of the said circuit court this the thirtieth day of May, in the year eighteen hundred and seventy-four.

[SEAL.] JAS. McPHERSON, *Clerk.*

(Indorsement on cover:) No. 239. William D. Stewart, as admr. of James Stewart, dec'd, Allen S. Cutts et al., appellants, vs. Ezekiel Salamon, Sidney Root, John N. Beach, & Edward W. Marshall, as Salamon, Root & Co. S. Georgia C. C. U. S. Filed 17th November, 1874.

Supreme Court of the United States.

OCTOBER TERM, 1876.

WILLIAM D. STEWART, *Adm'r, et al.*, *Appellants.*

vs.

SALAMON, ROOT & CO. *et al.*, *Appellees.*

No. 239.

From the Fifth Circuit Court of the United States for the Southern District of Georgia.

ALEXANDER H. STEPHENS,
and
C. P. CULVER,
For Appellants.

April 24, 1877.

R. O. POLKINHORN, Printer, 632 D St., N. W.

Supreme Court of the United States.

OCTOBER TERM, 1876.

WILLIAM D. STEWART, *Adm'r, et al.*, *Appellants.*
vs.
SALAMON, ROOT & CO. *et al.*, *Appellees.*

No. 239.

From the Fifth Circuit Court of the United States for the Southern District of Georgia.

This case is not only voluminous and intricate, but of a most anomalous character. For a clear understanding of its true nature, in the narrowest compass, it is necessary to present a few facts as postulates, which appear from the "Record," in its confused complication.

1. One Benjamin Mordecai, of South Carolina, had a claim of indebtedness, on the 8th day of January, 1863, against one Allen S. Cutts, of the county of Sumpter, and State of Georgia, for $44,000. To secure the payment of which sum of money, one James Stewart, of said county and State, for the accommodation of the said Cutts, made his promissory note under seal on said 8th day of January, 1863, for said sum of $44,000, payable to the order of said Cutts, twelve months after date, with interest from date. This note the said Cutts then and there endorsed to said Mordecai; and on the same

day, the said Stewart, for the like accommodation of his friend, Cutts, made to said Mordecai a mortgage on real estate in the town of Americus, in the said county of Sumpter, and State of Georgia, to secure the payment of said note according to its tenor and effect, which mortgaged property was valued at the time, at a sum far above the amount of said note. (R. pp. 11, 14, 15.)

2. On the 17th day of March, 1866, the said A. S. Cutts paid to the said Mordecai the sum of $15,325, and which is endorsed on said note. (R. p. 14.)

3. On the same day, to wit, the 17th day of March, 1866, the said Mordecai commenced his action at law on said note in the Superior Court of the said county of Sumpter, and State of Georgia, against the said James Stewart and Allen S. Cutts, for the balance due on said note; and at the same term of said court, to wit, the April term, 1866, the said Mordecai instituted proceedings for the foreclosure of said mortgage, according to the statutes of Georgia. Subsequently, on the trial of the cases for the foreclosure of the mortgage and suit on the note, the verdict of the jury and the judgment of the Court were in favor of the defendant. Mordecai then took the cases to the Supreme Court of Georgia, which overruled and set aside the judgment and granted a new trial; and the remitter of the said Supreme Court was entered upon the minutes of the court below. (R. pp. 16, 17.)

4. The said Mordecai, afterwards, to wit, on the 18th day of January, 1867, dismissed his said two cases, and moved for a transfer, under the act of Congress, to the fifth Circuit Court of the United States for the Southern District of Georgia, on the ground that he could not get justice in the State Courts, which motion was granted against the earnest protest of the said James Stewart. (R. pp. 13, 23, 31.)

5. At the October term of the said Superior Court of Sumpter County, for 1867, said James Stewart brought a bill on the Chancery side of said court enjoining further proceedings, at common law, in said cases; and setting up substantial equities against any recovery thereon.

6. On the 10th day of August, 1867, said Mordecai assigned to complainants in this bill, said promissory note and mortgage, as collateral security for alleged anterior debts due by said Mordecai to them; and afterwards, to wit, on the 3d day of October, 1870, he, the said Mordecai, was duly declared a bankrupt, in a Federal Court sitting in the city of Charleston, and the State of South Carolina. (R. pp. 3, 85.)

7. Subsequent to said assignment, to wit, on the —— day of February, 1870, the said James Stewart departed this life intestate, and the said William D. Stewart, the principal appellant in this cause, was appointed his administrator. (R. p. 67.)

8. Under this state of facts, the complainants brought this bill in the fifth Circuit Court of the United States, for the Southern District of Georgia, sitting at Savannah, in and for said District, on the 14th day of November, A. D. 1871, against the defendants therein stated. (R. pp. 46, 47.)

This was without the authority of law, and in conflict with the decisions of this court. *See* 19 *Wall.*, p. 575.

By the terms of the United States Revised Statutes (ch. 7, sec. 639, par. III) the petition for removal must be filed before the trial or final hearing of the suit. (See Rev. Stat. U. S., pp. 113, 114.)

It appears, as aforesaid, that the cases of Mordecai *vs.* Stewart & Cutts were moved from the State courts into the United States Circuit Court *after* a final judgment in

the court of original jurisdiction, and that no application was made for said removal before said final judgment. (R. pp. 13, 28, 40.)

Salamon, Root & Co., the appellees, claim nothing except as the assignees of Mordecai. The assignee must stand in the stead of the assignor, and can claim no legal right not inhering in such assignor. *See* 6 *Cranch U. S. Reports*, 352, *Sers vs. Pitol.*

Such petition will not, therefore, be entertained when filed in the State court after a verdict in the cause has been rendered, notwithstanding the verdict may have been set aside for error, and a new trial ordered. *See* 19 *Wall.*, 576, and cases there cited; 13 *Wall.*, *p.* 432. Also the following cases decided in the State courts, viz: *Horace Gilpin vs. Alfred P. Cretchlin, Supreme Judicial Court of Massachusetts, reported in the American Law Register for March*, 1874, pp. 137 to 145; *Chandler vs. Coee; Supreme Judicial Court of New Hampshire, do. for September*, 1876, pp. 540 to 544. Abbott's Digest, vol. 3, 195; Deady's Reports, 288.

9. The facts connected with the proceedings in the Georgia courts are set forth in the record only as an exhibit to said bill. Nor are the papers, as so set forth, full and complete copies of the proceedings had in said cases in the State courts. This the act of Congress expressly requires. Nor was said case or cases so ordered to be removed ever entered on the minutes of said United States Circuit Court; and, hence, said court had no rightful jurisdiction in the premises, as above shown. All this the appellants insisted in the court below, and now insist before this honorable tribunal, was and is error. (R. p. 31.)

10. The weight of evidence, upon a careful perusal of all the testimony in the case, appellants insist before

your Honors, shows that said note was to be discharged in Confederate money—or, in other words, that what was meant by "dollars" in said note was Confederate dollars. In this view of the case, the decree of Judge Wood on this point was quite as erroneous as on the other. *See the celebrated "Confederate Note Case,"* 19 Wall., 548; *do.*, 572. 1 Otto, p. 3.

ALEXANDER H. STEPHENS
and
C. P. CULVER,
for Appellants.

Supreme Court of the United States.

STEWART *et al.*,
vs.
SALOMON *et al.*

No. 239.

BRIEF OF P. PHILLIPS,
W H Phillips
for Appellees.

R. O. POLKINHORN, Printer, 632 D St., N. W.

Supreme Court of the United States.

STEWART *et al.*,
vs.
SALOMON *et al.*

No. 239.

BRIEF OF P. PHILLIPS,
W. H. Phillips
for Appellees.

The bill in this case was filed on the 14th November, 1871, by the firm of Salomon, Root & Co., and the principal defendants are Cutts and Stewart. It avers that the said defendants being indebted to one Benjamin Mordecai executed to him, on the 8th January, 1863, their sealed note, whereby Stewart promised to pay to Cutts, or order, for value received $44,000.

To secure this note Stewart, on the same day, executed to Mordecai a mortgage on certain real estate in the city of Americus.

That on the 10th August, 1867, Mordecai endorsed and assigned this note and mortgage to the complainants to secure the payment of $33,454.45, then due by him to them, as per two promissory notes, one for $23,454.45, and one for $10,000.

The first of these notes was secured by mortgage on property in Charleston. The second was a note of Purcel and Davis, endorsed by Mordecai. The Charleston

property yielded nothing, as it was sold to pay a prior mortgage, and nothing has been made out of the note of Purcell and Davis.

The bill avers that the note and mortgage executed by Stewart and Cutts to Mordecai was for a previous indebtedness on various sums, and on a "full settlement on a gold basis."

That in March, 1866, Mordecai commenced a common law proceeding in one of the State Courts of Georgia to foreclose the mortgage, and Stewart, in same court, filed a bill in equity against him, pending which Mordecai removed all the proceedings to the Circuit Court of the United States.

Mordecai, long subsequent to his transfer to the complainants, was adjudged a bankrupt and Burke appointed his assignee, and since the removal Stewart has died, and Wm. D. Stewart has been appointed his administrator. The assignee, administrator and heirs of Stewart are therefore made parties.

The bill charges bad conduct on the part of the administrator, who, after a refusal by the ordinary to allow a decision of the estate of Stewart, in total defiance of the court has "divided and partitioned the entire estate," and made no return or record of such partition.

It is further averred that the only security the complainants have for the payment of their indebtedness is the note and mortgage assigned to them by Mordecai.

That the assignee in bankruptcy could not be made a party in the place of Mordecai in the common law proceeding filed by him, because of the assignment to complainants prior to his appointment, nor could the complainants, because they have no such legal interest as would authorize the suit to proceed in their name.

The bill prays that the tenants of the mortgaged prop-

erty, who are also made defendants, be restrained from paying rent to Stewart or Cutts, and that they, with Burke, be restrained from further pressing the suits in the Circuit Court of the United States, and "that they be required to litigate with your orators in this bill; that an account be taken of the amount due on the sealed note and mortgage aforesaid, and that in failure of said defendants to pay the amount found due the mortgage premises should be sold and the mortgage foreclosed.

The note exhibited by the bill is dated 8th January, 1863, payable twelve months after date, and contains an endorsement under date of 17th March, 1866, of $15,325.

There is also filed as exhibits the legal proceedings referred to in the averments.

A separate answer was filed by Cutts which admits the execution of the note and mortgage, but says that this was done by Stewart purely for his accommodation, and insists that the said note was to be paid in Confederate currency, which was worth at the date of the note three for one, and at its maturity twenty-one for one.

It further avers that Mordecai was indebted to respondent for several large sums paid to him for usurious interest in the years 1856–7–8–9, and 1860. The exact dates and amounts, owing to the destruction of his books and papers, cannot be stated. These claims for usurious interest he had assigned to Stewart, to whom he was largely indebted. "This covenant and assignment took place some time in the year 1866."

As to the payment endorsed on the note, it is said, "that on the 17th March, 1866, he paid, without any

agreement that the same was a valid claim in greenbacks or in gold, $15,325 in lands, which before the war was worth $2.50 per acre, said payment was then worth in United States currency the said sum of $15,325." (p. 51.)

There is exhibited to the answer a letter from Mordecai dated December, 1862, accepting a proposition that Stewart should give a mortgage to secure the indebtedness to him. (p. 53.)

A separate answer is also filed by Stewart's administrators. (p. 58.)

It makes the same averments as are made in the answer of Cutts, and details the division of Stewart's estate, estimated at $80,000, which was divided among his seven heirs.

A motion was made to dismiss the bill, on the ground that the cases of *Mordecai* vs. *Cutts*, to which this is ancillary, were improperly and illegally removed into the ~~Supreme~~ Court; whereupon, it was ordered by Judge Woods "that the motion to dismiss be overruled and the said cause proceed." (p. 83.)

On the 25th May, 1873, the assignee of Mordecai was made a party and the further order made by Judge Woods; that by *consent of parties*, all the depositions used before Judge Erskin, on the motion to appoint a Receiver, be used on the hearing of the cause on its merits at the next term, and that each party have leave to take further testimony by interrogatories on ten days' notice; that the cause be set for trial on 28th November, 1873, and the said parties interested in the bill, and the causes antecedent thereto and connected therewith removed from the Supreme Court, be required then and there to litigate their rights." (p. 85.)

The cause was heard by Judge Woods, and a final decree in favor of complainant was entered on the 15th of December, 1873, stating the amount due on the note for principal and interest, foreclosing the equity of redemption, and directing a sale of the premises, and if any balance should remain after applying the proceeds of the sale, to be collected by execution against the administrator of said Stewart, to be levied of the property of the deceased in his hands to be administered, and against said Cutts as indorser, &c. (p. 87.)

From this decree an appeal is taken to this court, with a supersedeas bond.

Litigation in State Court.

The contest in the State Courts resulted in a judgment against Mordecai, who carried the case to the Supreme Court; and at the June term, 1867, the judgment was reversed, the court holding that "where parties make an agreement by which one pays and the other receives a certain amount, which is entered as a credit on the note, the note is extinguished *pro tanto*, and the remainder due on the note stands unaffected by the entry of the credit. The amount credited cannot be enlarged in the absence of any agreement of the parties, so as to extinguish a greater monied amount named in the credit in this case. The credit of $15,325 extinguished that amount of the note, leaving the remainder unaffected in any wise by it." (p. 23.)

36 Geo., 137.

Before any final disposition was made of the cases Mordecai petitioned for removal to the Circuit Court of the United States for the southern District of Georgia, under the acts of 27th July, 1866, and 2d March, 1867. His

affidavit was made 11th April, 1868, and, together with his bond, will be found on pp. 12, 13.

The application was strenuously resisted, and, on account of the relationship of the presiding judge to one of the parties, and by agreement, this matter was referred to Adam R. Brown, Esq., a member of the bar, who, in April, 1869, entered an order that the case of *Mordecai* vs. *Stewart and Cutts* and *Stewart* vs. *Mordecai and Cutts*, the transfer of said causes having been agreed to be tried together, be removed into the Circuit Court as prayed for. (pp. 45, 46)

Dissatisfied with this, Stewart carried the case to the Supreme Court, where the judgment for removal was affirmed; and at the April term, 1870, of the Sumter Superior Court, in accordance with said affirmance, it was ordered "that the cases to which said judgment applies, together with copies of all processes, pleadings, depositions, and testimony in said cases in this court, be entered in the said Fifth Circuit Court of the United States for the Southern District of Georgia by Benjamin Mordecai by the first day of the next session." (p. 47.)

The Facts.

The defendant below failed to convince the court that there was any agreement for the payment of the note in Confederate currency, or that he was entitled to any credit on the same by reason of the payment by Cutts of usurious interests.

These defenses to the note are renewed here, and the question is whether the evidence justifies a reversal of the decree.

The evidence for defendant rests upon the answer of Cutts and his affidavits—one dated 16th April, 1872, (p. 75,) and the other 10th May, 1873, (p. 83.)

On the other hand, we have the affidavit of Mordecai, (p. 55,) the affidavit of Nisbet, (p. 54,) and the deposition of Houston, (p. 72.)

The statement of Cutts is, that he, in connection with Gilmore, was a contractor on the Georgia and Pensacola Railroad, and the compensation, in the main, was to be paid in lands.

To carry on this contract he purchased slaves from Mordecai, giving his notes and mortgage to secure the purchase money. Being unable to pay at maturity these notes were extended on usurious rates of interest, and in 1860, with some small advances in money, amounted to over $60,000.

Besides the chattel mortgage, this debt was secured by a draft accepted by the Company for 50,000 acres of land.

In this condition of things it was determined by the Company to convey all its lands to trustees to secure its bonds, and to carry out this scheme he relinquished his lands with Mordecai's consent. But this consent was given on Mordecai's requirement that there should be delivered to him as collateral $110,000 of these bonds, and this was done.

As this amount of bonds was more than the deponent was then entitled to as contractor, the Company required Mordecai to deliver to it the mortgage on the negroes, until the contract for work on the road was finished, when he would become entitled to this amount of bonds.

Subsequently, Mordecai being anxious to realize his debt, purchased the bonds from deponent, in 1860 or 1861, at the then market rate of sixty cents, and thus realized $66,000, which covered all that was due for the purchase of slaves, the usurious interest charged, and the money advances.

Sometime in 1862, after his contract had been completed, he learned that the Railroad Company had determined not to pay the bonds, nor deliver to plaintiff the chattel mortgage until the bonds were returned to be canceled, and that they had sued out process in the courts of Florida by which the negroes had been seized and placed in the hands of a receiver.

To avoid this embarrassing litigation he entered into a negotiation with Mordecai, which resulted, on the 6th January, 1863, in his purchasing the bonds and coupons, which amounted to $106,679.19, their then market value in *Confederate currency*. This amount was settled by a cash payment in Confederate currency of $12,679.19; a promissory note due one day after date $50,000, secured by an order for 5,000 acres of land, and Stewart's note and mortgage (now in suit) for $44,000.

Mordecai then delivered up the bonds to the Company on their acceptance of the order for the lands, the chattel mortgage was canceled, the negroes restored to his possession, and all the lands to which he was entitled conveyed to him.

In a few months thereafter he paid in Confederate currency the $50,000 note, and this was accepted as a full payment of the same.

He then admits that besides this indebtedness Mordecai held other debts of deponent, referred to in the affidavit of Nesbit, to wit, his note for $20,000, secured by the accepted draft of Cutts & Johnson and James Stewart, for $15,000. He avers, however, that this was the property of one Savage; that he paid Savage, and that Mordecai, on the order of Savage, had delivered him up the papers.

He then admits that Mordecai held three notes of James Stewart, given by deponent in 1860 for $10,000

each. These, he says, were collateral to a note of his for $28,000, due to Mordecai for the purchase of slaves during that year on his individual account, and had no connection with the purchase of slaves by Cutts & Gilmore, and was not included in or in any wise connected with the debts settled from the sale of the bonds.

Besides this, it is said Mordecai controlled a debt to the South Western R. R. Bank for about $8,000, but this together with the above $28,000 note were in 1866 compromised for the sum of $14,833.30; Mordecai receiving payment in 12,000 acres of Florida land at $2.50 per acre or $30,000, crediting, the balance $15,325 on the Stewart note for $44,000.

Testing the case upon these statements of the principal debtor himself, we have the fact admitted, that there was due prior to the war upwards of $60,000 on the purchase of slaves and money advanced. That there was also due the two amounts of $8,000 and $28,000. These several sums due before the war were, of course, payable in legal currency.

How were they extinguished?

If the first item of $60,000—was settled in 1863, as is averred, in confederate currency, it should have yielded Mordecai $180,000 in that currency, and yet it is said Mordecai agreed to receive for this sum, $106,679.19 in such currency.

Again, in 1874, when the note became due, Cutts swears that confederate currency was twenty for one. At that time, therefore, Stewart's note secured by mortgage for $44,000, could have been extinguished for $2,200, in good money, if such had been the agreement. Yet it is

not pretended that either Stewart or Cutts ever offered so to pay the same.

Again, in 1866, when by the sale of lands there was paid in good money to Mordecai $15,325—this was credited on the note without any stipulation or ageement between the parties, as to the currency.

If Cutts speaks truly that the note was payable in confederate currency, that payment extinguished the whole sum, calculating the rate of confederate currency at the date of the note, or twenty times the amount, taking the rate at its maturity.

Yet nothing is said looking to this payment as an extinguishment of the note, and the note and mortgage are left outstanding in the hands of Mordecai, and nothing is done or said, in opposition to their continued validity, until Mordecai filed his proceeding in the State Court in 1866, to foreclose the mortgage.

There is nothing therefore, to give credence, to the averment that this $44,000 note was payable in confederate currency, but the affidavit of Cutt's himself.

His answer to the bill in no wise strengthens this affidavit, as he was only required to answer under oath the 1st, 2d, 3d, 4th and 5th interrogatories, pp. 6 and 9, and then in no wise refer to the kind of currency in which the payment was to be made.

At p. 51 of his answer he says—that "on the 17 March, 1866, he paid *on* said claim, *and without any agreement* that the same was a valid claim in greenbacks or gold, $15,325 in lands, said payment was then worth in U. S. currency the said sum of $15,325."

If the case then stood upon this affidavit alone, the decree would be sustainable, as all the facts demonstrate that the note was payable in legal currency.

The Evidence.

In addition to what has already been stated we now refer to the pleadings in the State Court.

It will be seen that Cutts as well as Stewart were served with process. p. 11.

But Cutts never entered any appearance or plea.

Now as to Stewart, at p. 22, is his plea, in which he relies alone upon Mordecai's indebtedness to Cutts of $25,000 usurious interest paid by the latter.

At p. 24, he again enters his plea setting up the same matter, as is said with Cutts' consent, and that Cutts agrees to become a party to the suit.

At p. 26, Stewart files another plea objecting to the foreclosure on the ground that, as the note was made between the 1st January, 1861 and the 5th June, 1868, the value of the currency in which it should be paid ought to be fixed upon the principles of equity.

This plea does not rest upon any agreement of the parties as to the character of the money in which it is to be discharged, but wholly upon the presumption arising from the date of the note, as bringing it within the provisions of the State ordinance.

Referring now to the evidence of witnesses, we have that of Col. Charlton, who testifies that in September, 1866, he applied to Stewart to purchase the Hotel property covered by his mortgage to Mordecai, and as a condition Stewart required an advance of $7,000 to be paid to Mordecai, and Mr. Goode, Mordecai's attorney was requested to write to him to procure his release. p. 17.

He further testifies that at that time an estimate was made as to the sufficiency of the mortgage property to pay the debt was entered into, and "all the parties came to the satisfactory conclusion, there would be just about enough property to pay the amount called for on the face of the note and mortgage." p. 18.

At pp. 37 and 38, will be found the written agreement for the purchase of the hotel property—upon the back of which is the endorsement of Mordecai's attornies—"we hereby agree to release the mortgage upon the payment to us of $7,000, between the 1st January and 1st March next, and a receipt of a mortgage upon 1,000 acres of Missouri land this 20th September, 1866."

It will be remembered that the payment on the note of $15,325 in good money, which is now set up as an extinguishment of the whole debt was made on the 14th March, 1866, and here we have Stewart agreeing to the payment of $6,000 more six months after such alleged extinguishment.

But it was not only an admission by Stewart of the existing indebtedness on the note and mortgage—for the witness further testifies that Cutts "agreed to reimburse Stewart for $7,000 purchase money which was to go to Mordecai in case he could not make arrangements with him." p. 18.

Further, we have the testimony of W. D. Stewart, who says that at the October term, 1866, he was the agent of his father, and called as a witness. He was then asked by the plaintiff's attorney "if he or his father had any objection to making the rule *nisi* absolute?" (for the foreclosure of the mortgage,) and witness replied "that neither he or his father had any defence as he knew of." p. 18.

If anything more were wanting to disprove the unsupported evidence of Cutts it may be found in the deposition of Mordecai, who has been discharged from all his debts, and swears he has no pecuniary interest in the controversy. He gives a full statement of the transaction, and wholly refutes the idea that Confederate currency was ever mentioned as the means for discharging this note.

There can, therefore, be no pretence for reversing the decree, without it can be shown that under the State ordinance the date of the note is conclusive evidence that it was to be discharged in such currency.

This ordinance is cited in the case of *Slayter* vs. *Culpper*, 35 Geo., 27, and provides "that all contracts made between the 1st of June, 1861, and the 1st June, 1865, whether in writing expressed or implied, or existing in parol, and not yet executed, shall receive an equitable construction, and either party in any suit for the enforcement of any such contract may upon the trial give in evidence the consideration and the value thereof at any time, and the intention of the parties as to the particular currency in which payment was to be made, and the value of such currency at any time, and the verdict and judgment shall be on principles of equity."

In *Jackson* vs. *Jackson*, 47 Geo., 116, the suit was on a note dated in 1863, payable one day after date. The plea was that this was within the ordinance. The court charged that if the note was given as a renewal of a debt due before the war, it was not within the ordinance. The case was taken to the Supreme Court, and the judgment was affirmed.

In *Owen* vs. *Welles*, 41 Geo., 83, suit was on a note executed in 1860, and the plea was that it was a renewal of a note given in 1862. This was held not to be within the ordinance. The court saying, viz: "Here the parties, long after the publication of the ordinance, met and adjusted the equities between themselves, and the plaintiff gave the defendant a new note. It is not pretended that the new note was procured by fraud or mistake. Why should the court interfere and bring the note within the ordinance by construction to relieve the party of the payment of a sum which he has, with a knowledge of all

the facts and his rights under the ordinance, admitted to be due."

This ordinance, in allowing the parties to offer evidence as to the currency in which payment was to be made, asserts the same principle as was established in *Harington* vs. *Smith*, 8 Wall., 1, on a contract made in Alabama where no ordinance existed. In this and in the case of 19 Wall., 555, coming from North Carolina and involving the construction of a similar ordinance, it is held that while evidence may be introduced to give effect to the interest of the parties to the contract, "in the absence of such evidence the presumption of law would be that by the term 'dollars' the lawful currency of the United States was intended."

In the case before us this presumption of law is made sure by the evidence as to intent.

What was the intent is a question of fact, which, in a common law case, would have been submitted to a jury, and if found by them would have been finally determined and been incapable of review. This question of fact has been passed upon by the Chancellor, and his decree thereon will not be reversed without it can be shown clearly that his judgment was unsustained by the evidence.

P. PHILLIPS,
for Appellant.